JUDICIAL TENURE ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

S. 1110

FEBRUARY 18, 25, 26; MARCH 10, 11, 1976

Printed for the use of the Committee on the Judiciary

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JUDICIAL TENURE ACT

WEDNESDAY, FEBRUARY 18, 1976

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m. in room 6202, Dirksen Senate Office Building, Hon. Quentin N. Burdick (chairman) presiding.

Present: Senators Burdick (presiding) and Scott (Virginia).

Also Present: William P. Westphal, Chief Counsel; and Kathryn M. Coulter, Chief Clerk.

Senator BURDICK. Today we have scheduled the first of several days of hearings on S. 1110, the so-called Judicial Tenure Act.

The thrust of this legislation is to provide a new system or structure, separate and distinct from impeachment, for the removal or censure of Federal justices and judges. The bill also authorizes the involuntary retirement of Federal judges or justices for mental or physical disability, including habitual intemperance. In this latter respect, relating to involuntary retirement, the bill is similar to section 372(b) of title 28, except that it would include Justices of the Supreme Court among those judges who can be involuntarily retired.

Consideration of S. 1110 raises a number of legal and policy questions which are not of easy resolution. A few of the more important questions are these:

One: Does the Constitution imply that impeachment is the sole means for removal of Federal judges?

Two: Does the "necessary and proper clause" of article I, section 8, of the Constitution authorize the Congress to enact legislation implementing the "good behavior" clause in section 1, article III?

Three: If Congress has such power, what is "bad behavior"?

Four: In considering the behavior of a judge, are we to be concerned with his private and personal conduct or only his official conduct?

Five: If the "official conduct" of the judge is the matter under consideration, to what extent does inquiry into that conduct pose a threat to the independence of the judiciary to decide cases upon the merits, without regard to political considerations?

Six: Is the term "bad behavior" synonymous with the term "bad judge"?

Seven: In this day of "sunshine laws," to what extent may proceedings against a judge be confidential and what are factors which would affect the confidentiality or publication of such proceedings?

It seems to me that each of these questions must be answered in a definitive way before we can give final consideration to the structure of a new system for removal, censure, or involuntary retirement of our justices and judges.

To help us in our consideration of these and other questions, we have with us today the chief sponsor of this legislation, the distinguished gentleman from Georgia, my colleague, Senator Sam Nunn. We will also hear today from the representatives of the National Association of Attorneys General and the American Bar Association.

Before calling Senator Nunn, the bill, S. 1110, will be made a part of the record.

[The document referred to follows:]

94TH CONGRESS
1ST SESSION

S. 1110

IN THE SENATE OF THE UNITED STATES

MARCH 7, 1975

Mr. NUNN (for himself, Mr. ALLEN, and Mr. GARN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To establish a Council on Judicial Tenure in the judicial branch of the Government, to establish a procedure in addition to impeachment for the retirement of disabled Justices and judges of the United States, and the removal of Justices and judges whose conduct is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, this Act may be cited as the "Judicial Tenure Act".

PROCEDURES FOR REMOVAL AND INVOLUNTARY RETIREMENT

SEC. 2. (a) Chapter 17 of title 28, United States Code, is amended by adding at the end thereof the following new sections:

"§ 377. Council on Judicial Tenure; establishment

"(a) There is established in the judicial branch of Government a Council on Judicial Tenure to further the honest, impartial, and efficient administration of justice in the courts of the United States in accordance with the duties imposed upon it by law.

"(b) The Council shall be composed of one member from each circuit, one member from the Court of Claims, one member from the Court of Customs and Patent Appeals, and one member from the Customs Court. Each member shall be a judge who is in regular active service. The member from each circuit shall be elected by the circuit and district judges of each circuit at a judicial conference of each circuit held pursuant to section 333 of this title. The members from the Court of Claims, Court of Customs and Patent Appeals, and Customs Court shall be elected by the judges of their respective courts. A judge who is a member of the Judicial Conference of the United States may not serve simultaneously as a member of the Council on Judicial Tenure. The members of the Council shall elect one of the members as Chairman of the Council.

"(c) (1) The term of each member of the Council shall be three years except that a member elected to fill a vacancy shall serve for the remainder of the term for which his predecessor was elected. A judge may serve on the Council for

not more than two full terms except that a judge who fills a term that has been vacated may be reelected to the Council for one full term only.

"(2) The term of a member of the Council shall become vacant automatically when such member (A) resigns, retires, or is permanently separated from regular active service as a judicial officer, (B) becomes a member of the Judicial Conference of the United States, or (C) becomes a Justice of the United States.

"(d) Performance of duties as a member of the Council shall constitute the transaction of official business within the meaning of section 456 of this title.

"§ 378. Council on Judicial Tenure; duties and powers

"(a) It shall be the duty of the Council to receive and investigate each written complaint by any person concerning a Justice or judge of the United States and to determine whether the grounds specified in section 372a of this title for removal of a Justice or judge from office or censure or, in section 372 of this title for involuntary retirement of a Justice or judge, exist. If, after a preliminary inquiry by the Chairman, any such complaint is found to be frivolous, unwarranted, or insufficient in law or fact, the Council may dismiss such complaint. If such complaint is not dismissed, a panel appointed under subsection (b) shall conduct a hearing with respect to the fitness of such Justice or judge.

"(b) (1) In carrying out its duties under this section the Chairman of the Council shall appoint such panels, consisting of five members of the Council, at least four of whom are representatives of the circuit or district courts, as may be necessary in order that each complaint not dismissed under subsection (a) may be considered by such a panel.

"(2) For the purpose of the transaction of any business a quorum of any panel appointed under paragraph (1) shall be three members. A panel shall act upon the concurrence of any three of its members, except that the concurrence of four members is required to effect a recommendation to the Judicial Conference of the United States that any of the grounds specified in section 372 or 372a of this title for the involuntary retirement, removal of a Justice or judge from office, or censure exist.

"(c) Whenever the Council orders an investigation or hearing with respect to the fitness of any Justice or judge to continue in office, it shall provide not less than thirty days notice to such Justice or judge of the date on which any hearing is to be conducted. Any Justice or judge who is the subject of such an investigation has the right to appear at any such hearing, and make a statement in his own behalf. The Council shall maintain a record of any such hearing.

"(d) The panel shall make findings of fact and a determination regarding the fitness of such Justice or judge not

later than ninety days after the conclusion of any proceedings conducted pursuant to this section. Such findings and determination shall be entered on the record of such proceedings and shall be transmitted, together with any recommendation thereon, directly to the Judicial Conference of the United States, to the Justice or judge under inquiry, and the complainant.

"(c) (1) The Council, or any panel designated by it, in carrying out its duties under this section may sit and act at such times and places, hold such hearings, take such testimony, require by subpena the attendance of such witnesses and the production of such books, records, papers, accounts, and documents, administer such oaths and issue such other orders as may be necessary. Subpenas and other orders shall be issued under the signature of the Chairman or the member of a panel designated by the Chairman. Any member of the Council or panel may administer oaths or affirmations to witnesses.

"(2) No person except the Justice or judge who is the subject of an inquiry under this chapter shall be excused from attending and testifying or producing anything ordered to be produced by the Council or panel on the ground that the testimony or material required to be produced may tend to incriminate such person or subject such person to penalty or forfeiture. No such person shall be prosecuted or subject

to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce, after having claimed his privilege against self-incrimination, except that such person shall not be exempt from prosecution and punishment for perjury committed while so testifying.

"(3) In case of disobeyance to a subpena or other order issued under paragraph (1) of this subsection, the Council or panel may invoke the aid of any district court of the United States in requiring compliance with such subpena or order. Any district court of the United States within the jurisdiction in which the person is found or transacts business may, in case of contumacy or refusal to obey a subpena or order issued by the Council or panel, issue an order to issue such person to appear and testify, to produce such books, records, papers, accounts, and documents, and any failure to obey the order of the court shall be punished by the court as contempt thereof.

"(f) The Council is authorized to appoint and fix the compensation of an executive director and a permanent staff of attorneys and such other personnel as may be necessary to carry out its duties under this section.

"§ 379. Duties of the Judicial Conference relating to proceedings with respect to removal, censure, and involuntary retirement

"(a) (1) It shall be the duty of the Judicial Conference

of the United States to elect, at its annual meeting, one member of the Conference to be the presiding officer on any matter concerning the removal, censure, or involuntary retirement of a Justice or judge of the United States. The Chief Justice shall not participate in any activity or action, including the election of a presiding officer, by the Conference concerning the removal, censure, or involuntary retirement of any Justice of the United States.

"(2) The Conference, or, with the concurrence of a majority of its members, a committee of nine judges, appointed by the presiding officer elected under paragraph (1) (one of whom shall be the presiding officer elected under paragraph (1)), shall sit as a court to hear any cause relating to the removal, censure, or involuntary retirement of a Justice or judge of the United States, or any proceeding under section 380 of this title. When so sitting, the Conference or committee shall be a court of the United States within the meaning of section 451 of this title and may exercise all appropriate judicial powers. Upon receipt of a recommendation from the Council on Judicial Tenure that a Justice or judge be removed, censured, or involuntarily retired, the presiding officer shall convene the Conference or committee designated under this paragraph to hear and determine the recommendation of the Council.

"(b) A proceeding under this section shall be de novo,

and shall be conducted on the record. The Council on Judicial Tenure, or representatives from the Council, shall appear and present materials and testimony in support of the recommendation of the Council. Any Justice or judge whose conduct is the subject of any such inquiry shall be given adequate notice of any hearing, shall be admitted to any such hearing, may be represented by counsel, offer evidence in his own behalf, and confront and cross-examine any witness against him.

"(c) During the pendency of any proceeding under this section the Conference or committee may order any judge of the United States who is the subject of such inquiry to cease the exercise of any judicial powers or prerogatives pending disposition of the inquiry. Such an order shall be issued over the signature of the presiding officer. Upon issuing such an order the Conference or committee shall, after consultation with that authority within the court of the judge affected by such order who is responsible for the assigning of business to judges, formulate such orders regarding the business pending before such judge as it may deem appropriate.

"(d) The Conference or committee shall have the power in all cases brought before it, by majority vote—

"(1) to order the censure of any Justice or judge whose conduct is found to be inconsistent with the good behavior required by the Constitution;

"(2) to order the removal of any such Justice or judge from office;

"(3) to order the involuntary retirement of any Justice or judge in accordance with section 372(b) of this title; and

"(4) to dismiss or remand (to the Council) any such case.

All orders of the Conference or committee shall be in writing and any Justice or judge affected by any such order shall be so notified in writing.

"(e) No person except the Justice or judge who is the subject of an inquiry under this chapter shall be excused from attending and testifying or producing anything ordered to be produced by the Conference or committee on the ground that the testimony or material required to be produced may tend to incriminate such person or subject such person to penalty or forfeiture. No such person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce, after having claimed his privilege against self-incrimination, except that such person shall not be exempt from prosecution and punishment for perjury committed while so testifying.

"(f) (1) The Conference or committeee shall stay (A)

any order of removal of a judge and (B) any order of removal, censure, or involuntary retirement of any Justice pending final disposition of the case by the Supreme Court. Any such stay shall expire on the day after the day on which the time for seeking review has passed without the filing of an appeal. Upon affirmance by the Supreme Court of the order of the Conference directing removal, censure, or involuntary retirement of a Justice or removal of a judge or upon the expiration of the time for seeking review of any such order without the filing of an appeal, the order of the Conference shall become final and the judge shall be removed from office or, in a case affecting a Justice, the Justice shall be censured, involuntarily retired, or removed from office according to the order of the Conference.

"(2) In any case in which a Justice or judge is removed or involuntarily retired under this chapter, the Conference shall certify, at the time its order becomes final, notice to the President that a vacancy exists in the office from which the Justice or judge has been removed or involuntarily retired. The President shall appoint, by and with the advice and consent of the Senate, a successor to fill any vacancy caused by the removal of a Justice or judge under this section.

"(g) The Conference or committee shall notify any Justice or judge of its determination that the conduct or

fitness of such Justice or judge does not warrant removal, censure, or involuntary retirement. The Justice or judge shall be informed that, upon receipt of his written request, the Conference shall make information regarding the nature of its investigation, its hearings, findings, and such other matters regarding its proceedings in his case as are not confidential, privileged under law, or otherwise prejudicial to the rights of any individual available to the public. Upon receipt of such request the Conference shall make such information available to the public.

"(h) The Conference is authorized to employ such permanent staff assistance as may be necessary to carry out its duties under this chapter. The Conference may employ on a temporary basis such other personnel as may be necessary to carry out its duties under this chapter in any particular case. The Conference may arrange for and compensate medical and other experts and reporters, and arrange for the attendance of witnesses including witnesses not subject to subpena..

"§ 380. Failure to assign judicial duties

"(a) The Council on Judicial Tenure shall designate a panel from among its members to hear any claim by a judge involuntarily retired under section 372 (b) of this title that he is not being assigned such judicial duties within his court as he is willing and able to undertake. Whenever any such

claim is substantiated to the satisfaction of a majority of such panel, it shall promptly report its findings to the Judicial Conference of the United States, together with a recommendation that the Conference issue an order to the appropriate authority responsible for the assignment of judicial duties to such judge. Upon receipt of such recommendation the presiding officer of the Conference (elected under section 379 (a) (1) of this title) shall refer the matter to the Conference, or the committee designated to hear such matters, and the Conference or committee shall, at the earliest reasonable opportunity, consider the recommendation and resolve the claim of the retired judge. Action on any such matter shall be by majority vote. Upon resolution of any such matter, the presiding officer of the Conference shall transmit an appropriate order to the authority responsible for the assignment of judicial duties to such judge.

"§ 381. Disqualification of judges

"(a) A judge who is a member of the Council on Judicial Tenure or the Judicial Conference of the United States shall not participate in any proceeding of either such body when it inquires into his own conduct, fitness, or claim. No judge of the same court or circuit as the judge whose conduct, fitness, or claim is the subject of any inquiry by the Council or the Conference shall participate in such inquiry or in the determination by such body thereof.

"§ 382 Confidentiality of proceedings

"Notwithstanding any other provision of law, all matters filed with and all testimony given before a panel of the Council on Judicial Tenure or the Judicial Conference of the United States or its committee in connection with the removal or censure of a justice or judge under section 372a of this title or the involuntary retirement of a justice or judge under section 372 (b) of this title shall be confidential. Unless otherwise authorized by the justice or judge whose conduct, fitness, or claim is the subject of such a proceeding under this chapter, or otherwise authorized by this section, all such matters shall remain confidential, except that the taking of an appeal to the Supreme Court, under section 1259 of this title, shall render public all such matters to the extent that they are required for the disposition of the claim and for the conduct of any subsequent proceedings."

(b) The analysis of chapter 17 of title 28, United States Code, is amended by adding at the end thereof the following new items:

"377. Council on Judicial Tenure; establishment.
"378. Council on Judicial Tenure; duties and powers.
"379. Duties and powers of the Judicial Conference relating to proceedings with respect to removal, censure, and involuntary retirement.
"380. Failure to assign judicial duties.
"381. Disqualification of judges.
"382. Confidentiality of proceedings.".

GROUNDS FOR REMOVAL AND INVOLUNTARY RETIREMENT

SEC. 3. (a) (1) Chapter 17, of title 28, United States Code, is further amended by inserting after section 372 the following new section.

"§ 372a. Removal of judges

"A Justice or judge of the United States may be removed from office or censured in accordance with the procedures established under this chapter upon a finding by the Judicial Conference of the United States that the conduct of such Justice or judge is or has been inconsistent with the good behavior required by article III section 1 of the Constitution.".

(2) The analysis of such chapter is amended by inserting immediately below item 372 the following new item:

"372a. Removal of Justices and judges.".

(b) Section 372 (b) of such title is amended to read as follows:

"(b) Whenever any Justice or judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a majority of the Judicial Conference of the United States finds, subject to the requirements of section 379 of this title, that such Justice or judge is unable to discharge efficiently one or more of the critical duties of his office by reason of a permanent mental or physical disability, the Conference shall

certify the disability of such Justice or judge and issue an order removing such Justice or judge from active service. Habitual intemperance that seriously interferes with the performance of any one of the critical duties of a Justice or judge shall be deemed to be a permanent disability for the purposes of this subsection. Such Justice or judge shall then be involuntarily retired from regular active service and the Conference shall send notice of its action to the President.

"(c) The President shall, by and with the advice and consent of the Senate, appoint a successor to any Justice or judge retired involuntarily under the provisions of subsection (b) of this section. Whenever such successor shall have been appointed, the vacancy subsequently caused by the death or resignation of the Justice or judge involuntarily retired shall not be filled.".

SUPREME COURT REVIEW

SEC. 4. (a) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1259. Judicial Conference of the United States; appeal

"Upon the petition of the aggrieved Justice or judge the Supreme Court shall review the order of the Judicial Conference of the United States, pursuant to chapter 17 of this title, that such Justice be censured, involuntarily retired, or removed from office or that such judge be removed

from office for conduct inconsistent with the good behavior required by article III of the Constitution. Review under this section shall not be had unless such petition is filed within ten days after written notice of the determination of the Conference is received by such Justice or judge.".

(b) The analysis of such chapter is amended by adding at the end thereof the following new item:

"1259. Judicial Conference of the United States; appeal.".

DISABILITY RETIREMENT

SEC. 5. (a) Section 294(a) of title 28, United States Code, is amended by striking out "retired" and by inserting immediately after "Court" the following: "retired voluntarily or involuntarily".

(b) Section 294(b) of such title is amended by inserting immediately after "title" the following: ", or who has been involuntarily retired under section 372(b) of this title".

(c) Section 294(c) of title 28, United States Code, is amended—

(1) by striking out in the first sentence thereof "Any retired circuit or district judge may" and inserting in lieu thereof the following: "A circuit or district judge retired voluntarily under section 371(b) or 372(a) of this title or involuntarily under section 372(b) of this title may"; and

(2) by adding at the end thereof the following new sentence: "A judge of the United States retired involuntarily under section 372(b) of this title may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as such judge is willing and able to undertake.".

FEES

SEC. 6. Section 604 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(f) The Director shall pay necessary expenses incurred by the Judicial Conference of the United States and the Council on Judicial Tenure under chapter 17 of this title including mileage allowance and witness fees at the same rate as provided in section 1821 of this title.".

ASSISTANCE OF UNITED STATES MARSHALS

SEC. 7. Section 569(b) of title 28, United States Code, is amended immediately after "Canal Zone" by inserting "and of the Judicial Conference of the United States and the Council on Judicial Tenure under chapter 17 of this title".

MISCELLANEOUS

SEC. 8. (a) Within one hundred and eighty days after the date of enactment of this Act, the judges of each circuit, the Court of Claims, the Court of Customs and Patent Ap-

peals, and the Customs Court shall elect one member from each such circuit and such courts to serve on the Council on Judicial Tenure in accordance with section 377 (b) of title 28, United States Code (as added by section 2 (a) of this Act).

(b) Within one year after the date of enactment of this Act, the Council on Judicial Tenure shall promulgate rules for the conduct of its activities.

(c) Within one year after the date of enactment of this Act, the Judicial Conference of the United States shall promulgate rules of evidence for use in proceedings required under chapter 17 of title 28, United States Code.

(d) All rules promulgated pursuant to subsections (b) and (c), and amendments thereto, shall be matters of public record, and shall be effective upon promulgation.

AUTHORIZATION OF APPROPRIATIONS

SEC. 9. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

STATEMENT OF SENATOR SAM NUNN FROM GEORGIA

Senator BURDICK. Senator Nunn, we'll be pleased to hear from you.

Senator NUNN. Thank you very much, Mr. Chairman. I first want to thank you and the other members of this subcommittee for scheduling hearings on S. 1110, the Judicial Tenure Act. In my view, this is a very important opportunity to examine the merits of enabling the Federal judiciary to meaningfully enforce compliance with the constitutional standard of "good behavior."

Many lessons should be learned from the recent experience of the Watergate era. We have been reminded that power can intoxicate its holders and can be abused by the highest governmental officials in the country. We all recognize that public confidence in government has been eroded over the past few years and continues to decline.

It is imperative that all governmental officials act to restore and maintain the public trust. In no branch of government is this public confidence and respect more vital than in our judiciary. Our appointed Federal judges have a high degree of independence and they do not have to answer to the electorate, as do the President of the United States and the Members of Congress.

The need for a substantial degree of independence for the judiciary is clear, and the quality and integrity of our Federal judiciary as a whole is outstanding. However, I must point out that experience has vividly demonstrated that no one man, or group of men, can be assumed perfect and therefore left completely unchecked.

Despite the overall quality and integrity of our Federal judiciary, an occasional judge misbehaves or becomes physically or mentally disabled and continues to sit on the bench.

Historically, the sole method which has been utilized to remove a Federal judge who is disabled, for one reason or another, has been the impeachment power which is housed in article I, sections 2 and 3 of the Federal Constitution. This mechanism has proved to be inadequate in providing a meaningful tool through which to enforce the constitutional standard of good behavior which is imposed upon the members of the Federal judiciary in article III, section 1, of the Constitution.

When the Founding Fathers included Federal judges in the term "civil officers" who could be impeached, they were envisioning a nation comprised of a handful of States and a Congress with a limited workload. Today it seems unreasonable to assume that the Senate and the House of Representatives could lay aside all legislative business for a period of weeks or even months to impeach and try an obscure, yet misbehaving, judge. Mr. Chairman, as you well know, in the Senate alone we pass over 550 bills and have in excess of 600 rollcall votes in any one session.

History has born out this assumption. In the course of 200 years, only 54 judges and 1 justice have been officially investigated. Of these, only eight judges and one justice have been impeached, resulting in the conviction and removal of a mere four judges in almost two centuries. Mr. Chairman, while I am the first to appreciate the overall quality of the Federal bench, it seems unreasonable to assert that only four Federal judges in our history have misbehaved or been disabled. An even more significant fact is the fact that the last impeachment was in 1936, which was almost 40 years ago.

As Congress gets busier, the mechanism of impeachment becomes more and more remote. In 1940, on reporting a bill to establish an alternative removal procedure, the House Judiciary Committee pointed out that, in the context of the Federal judiciary, impeachment was an ineffective mechanism. And I quote from that report.

> It is a governmental absurdity that the cumbersome machinery of impeachment must be resorted to in order to procure the ouster of a district or circuit judge. There must be a logical relationship between the importance and power of the respondent and the taking up of the time of the whole Senate in order to try him. Stability is essential, but there is nothing more ridiculous than the picture of a whole Senate sitting for ten days to determine whether or not a district judge ought to be removed.

Former Senator McAdoo summed up the effectiveness of impeachment following the trial of Judge Ritter in 1936. He stated that this procedure—and I quote again—"amounts to a practical certainty that, in a large number of cases, misconduct will never be visited by impeachment."

The facts clearly demonstrate that impeachment has not been utilized, but then there's another question. Even if it were, is it a reasonable means through which to decide the merits of an allegation against a judge?

Congressman Summers said following the impeachment of Judge Louderbach in 1936, "the greatest farce ever presented. At one point only three Senators were present and for 10 days we presented evidence to what was practically an empty chamber."

Examination of the fifth amendment raises some interesting points regarding the propriety, if not the constitutional sufficiency, of a trial in which only three jurors out of 100 hear the evidence. A point of view which is too often ignored is that of the accused judge. There is no question that society's rights must be protected, but is impeachment, with its attendant public humiliation and loss of pension a proper remedy for a senile or a disabled judge who has served well, but now should be retired to make way for a more able judge?

We must also consider the possibility or probability that an acquitted judge will lose his credibility due to the public nature of the impeachment process, even when he is acquitted and returned to the bench.

Mr. Chairman, after closely examining the record on this subject, I must agree with Woodrow Wilson's statement that, "Judging by our past experiences, impeachment may be said to be little more than an empty menace."

The procedure is too cumbersome and impractical to be effective as it applies to the Federal judiciary. As Thomas Jefferson stated,

the impeachment procedures are "a bungling way, an impractical thing, a mere scarecrow."

S. 1110 would establish a practical and workable mechanism to implement the good behavior standard while also providing the procedural safeguards which impeachment lacks.

A Council on Judicial Tenure would be established within the judicial branch of Government consisting of one representative from each judicial circuit, one representative from the Court of Claims, one from the Court of Customs and Patent Appeals, and one from the Customs Court.

Each Council member must be a judge in regular active service and will be elected to a 3 year term by the respective judges of each circuit or court. A Chairman would be selected by the Council members. The Council would receive all written claims of judicial misconduct or disability. If after a preliminary investigation by the Chairman, the Council does not dismiss the complaint as frivolous, unwarranted, or insufficient in law or fact, the Chairman would appoint five members of the Council to a panel to investigate the allegations and hold hearings on the complaint. The panel would have full judicial powers in gathering information and conducting hearings and the accused judge would have an opportunity to be heard.

After investigating the complaint, the panel would either dismiss it or recommend to the Judicial Conference of the United States that it censure or remove the accused judge for conduct inconsistent with "good behavior," or involuntarily retire the judge due to a permanent physical or mental disability which seriously interferes with his performance of one or more of the critical duties of his office. The panel would appear before the Judicial Conference as an advocate for their recommendation.

At its annual meeting, the Judicial Conference would elect one of its members to serve as the presiding officer in any matter regarding a recommendation from the Council. Upon the receipt of such a recommendation, the presiding officer would convene the Judicial Conference or, in lieu thereof, a committee of nine members, including himself, to consider the panel's action.

The Conference, or its committee, would have the full powers of a court of the United States and the procedural rights of the accused judge are specifically provided.

The Conference or committee would have the power to temporarily suspend the accused judge from exercising any judicial powers or prerogatives pending disposition of the inquiry. After conducting hearings, the Conference or committee could dismiss the case or remand it to the Council on Judicial Tenure, order the judge censured or removed from office, or order the judge involuntarily retired. Also, Mr. Chairman, a specific right of appeal of the Conference's order to the Supreme Court is provided.

Upon affirmance by the Supreme Court or expiration of the period in which review may be sought, the order of the Conference or committee would become final. If the judge was removed or retired, the Judicial Conference would so notify the President so that a replacement could be nominated.

Mr. Chairman, I'm going to ask that, instead of going into all of the details of the legislation, that I be permitted to introduce as part of the record a section-by-section analysis, if the chairman would permit that.

Senator BURDICK. With no objection, it will be received.

[The documents referred to follow:]

S. 1110

SECTION-BY-SECTION ANALYSIS

SECTION 2. PROCEDURES FOR REMOVAL AND INVOLUNTARY RETIREMENT

Chapter 17 of title 28, United States Code is amended by adding sections 377 through 382.

SEC. 377. A Council on Judicial Tenure would be established in the judicial branch of government. The membership of the Council would consist of (a) one judge from each circuit elected by the circuit and district judges of each circuit at a judicial conference of the circuit and (b) one judge each from the Court of Claims, Court of Customs and Patent Appeals, and Customs Court elected by the judges of their respective courts. The members of the Council will elect a chairman from among themselves. Each member of the Council is elected for a three year term and may be re-elected to the Council for one full term only. Each member must be a judge in active service and a member's term will become vacant automatically if he retires or resigns from regular active service, becomes a member of the Judicial Conference of the United States, or becomes a Justice of the United States.

The performance of duties as a member of the Council constitutes the transaction of official business within the meaning of 28 U.S.C. 456, relating to traveling expenses of judges.

SEC. 378. It will be the duty of the Council to receive and investigate all written complaints submitted to it concerning the possible misconduct or disability of federal justices or judges and to make findings of fact and issue a recommendation to the Judicial Conference of the United States as to what action should be taken concerning such justices or judges. After receiving a complaint, the Chairman may conduct a preliminary investigation and either (1) ask the Council to dismiss the complaint as frivolous or unwarranted in law or in fact or (2) appoint a panel of five members (at least four of whom must be representatives of the various circuits) to hold hearings and investigate the complaint. Any such panel would act with the full authority of the council once designated and assigned. A Chairman's recommendation to dismiss a complaint must be approved by a majority of the full Council or a panel must be assigned to investigate the complaint.

The Council or a panel of the Council may hold hearings, take testimony, and issue such subpoenas and orders as are necessary to its investigation. An accused justice or judge must be given at least 30 days notice of any hearing and will have the right to appear at any such hearing and make a statement in his own behalf. No person except the justice or judge under inquiry would be excused from testifying on the ground of self-incrimination; however, no testimony given may be used against such person. In case of the disobeyance of a subpoena or order issued by the Council or Panel, the Council or Panel may invoke the aid of any federal district court to enforce its order. A record will be kept of all hearings.

The Council or Panel will make findings of fact and determine the fitness of the accused justice or judge within 90 days after the conclusion of proceedings. Such findings must be entered on the record and transmitted to the Judicial Conference, the justice or judge under inquiry and the complainant along with the Council or Panel's recommendations.

A quorum of the Panel will consist of three members. The panel may act on the concurrence of three of its members; however, the concurrence of four members is required to affect a recommendation of removal, retirement, or censure to the Judicial Conference.

The Council is authorized to employ a staff necessary to perform its duties under this section.

SEC. 379. The Judicial Conference of the United States would elect one member at its annual meeting to serve as the presiding officer on any matter initiated under this Act. The Chief Justice is expressly prohibited from participating in the election of the presiding officer or any other activity of the Judicial Conference under this Act.

Upon receipt of a recommendation from the Council on Judicial Tenure that a justice or judge be removed from office, censured or involuntarily retired, it will be the duty of the presiding officer to convene the Judicial Conference, or with the concurrence of a majority of its members, a committee of nine members appointed by and including the presiding officer, to consider such recommendation. The Council on Judicial Tenure or representatives of the Council will appear before the Conference and present materials and arguments to support their recommendations. The Conference or Committee will sit as a court under Section 451 of Title 28, United States Code, and may exercise all appropriate judicial powers. Pending the outcome of any proceeding under this section the conference or committee may suspend a judge under inquiry from exercising any judicial powers or prerogatives until the disposition of the inquiry.

Although a record would be kept of the proceedings at the Council level, any proceeding of the Judicial Conference under this section would be de novo. A record of all hearings would be kept and the accused justice or judge would be admitted to any hearing and may be represented by counsel, offer evidence in his own behalf and confront and cross-examine witnesses against him. As at a Council hearing, no person will be excused from testifying on the ground of self-incrimination but no such testimony may be used against him.

The Conference or Committee would have the power by majority vote to order a justice or judge censured or removed from office or involuntarily retired or dismiss or remand the complaint. All orders must be in writing and written notice given to the justice or judge under inquiry.

Any order of removal of a judge or of censure, removal, or involuntary retirement of a justice would be stayed pending final disposition of the case by the Supreme Court. Upon affirmance by the Supreme Court or failure to file a timely appeal the order of the Conference would become final.

In any case, where a justice or judge is removed or involuntarily retired from office, the Conference, when its order becomes final, would give notice to the President that a vacancy exists and the President would appoint, with the advice and consent of the Senate, a successor to fill the vacancy.

If the Conference or Committee dismisses the complaint it must so notify the justice or judge and inform him that it will release, upon receipt of written request from the accused judge, information to the public regarding the nature of its investigation, its hearings, findings, and other material not confidential, privileged under law or prejudicial to the rights of any individual.

The Judicial Conference would be authorized to employ such permanent and temporary staff as it need to perform its duties under this section.

SEC. 380. A designated panel of the Council or Judicial Tenure would hear any claims of a judge involuntarily retired under Section 372 (b) of Title 28 that he is not being assigned such duties as he is willing and aboe to undertake. Whenever a majority of a panel finds such a claim to be valid it will report its findings to the Judicial Conference along with its recommendations. Upon receipt of a recommendation, the Conference or a Committee of the Conference would consider the recommendation and resolve the claim of the retired judge. If a majority of the Conference or Committee found the claim to be justified, the presiding officer of the Conference would transmit an appropriate order to the authority responsible for the assignment of judicial duties to such judge.

SEC. 381. No member of the Council on Judicial Tenure or the Judicial Conference of the United States may participate in any proceeding of either such body when it inquires into either his own conduct or fitness or the conduct or fitness of a judge of the same court or circuit as such member.

SEC. 382. All materials and testimony given before the Council on Judicial Tenure or its panel or the Judicial Conference or its Committee under this act will be confidential unless otherwise authorized by the justice or judge under inquiry. However, the filing of an appeal to the Supreme Court will render public such materials and testimony as are necessary for the disposition of the appeal.

SECTION 3. GROUNDS FOR REMOVAL AND INVOLUNTARY RETIREMENT

Title 28, United States Code, and a new Section is added to Chapter 17, of Section 372 b of such chapter is amended.

SEC. 372a. A justice or judge of the United States may be removed from office or censured for conduct inconsistent with the good behavior required by article III section 1 of the Constitution.

SEC. 372b. Whenever a justice or judge is unable to efficiently discharge one or more of the critical duties of his office due to a permanent mental or physical disability the Judicial Conference may involuntarily retire such justice or judge from active service. Habitual intemperance which seriously interferes with the performance of one or more of the critical duties of a justice or judge is deemed a permanent disability under this section.

SECTION 4. SUPREME COURT REVIEW

A new section is added to Chapter 81 of Title 28, United States Code.

SEC. 1259. A Justice will have the right of review of the Supreme Court if the Judicial Conference orders him removed from office, censured, or involuntarily retired. A judge will have the right of review of the Supreme Court if the Judicial Conference orders him removed from office. To invoke this right of appeal the justice or judge must file a petition for review within ten days after the justice or judge receives written notice of the Conference's determination.

SECTION 5. DISABILITY RETIREMENT

Section 294 of Title 28, United States Code is amended to designate justices and judges involuntarily retired under this act as available for assignment to such active duties as they are willing and able to undertake.

SECTION 6. FEES

A new subsection is added to Sec. 604 of Title 28, United States Code to authorize the Director of the Administrative Office of the United States Courts to pay all necessary expenses, including mileage allowance and witness fees, of the Judicial Conference and the Council on Judicial Tenure.

SECTION 7. ASSISTANCE OF UNITED STATES MARSHALS

Section 569 (b) of Title 28, United States Code is amended to authorize the use of United States Marshals to execute the orders, process, and writs of the Judicial Conference and Council on Judicial Tenure.

SECTION 8. MISCELLANEOUS

The election of judges from the various courts to serve as members of the Council on Judicial Tenure must occur within 180 days after the enactment of this Act. Within on year after the enactment of this Act the Council on Judicial Tenure and the Judicial Conference must promulgate rules for the conduct of their activities under this Act.

All rules promulgated by the Council and Conference will be matters of public record and effective upon promulgation.

SECTION 9. AUTHORIZATION OF APPROPRIATIONS

Such sums as may be necessary to carry out the provisions of this Act are authorized.

Senator NUNN. Mr. Chairman, obviously certain constitutional questions arise in connection with this legislation, especially as they relate to the underlying principle of our government—the doctrine of separation of powers.

S. 1110 demonstrates concern for the separation of powers among the three branches of government, and I would like to deal for just a moment with what the Constitution says about checks and balances

and, on the other hand, perhaps just as important, what it does not say.

For example, the Constitution does not say that the only method of removing executive branch officials is by impeachment. While it is true that the President and Vice President may be removed only by impeachment and conviction of treason, bribery, or other high crimes and misdemeanors, it is also well settled that lesser executive officials may be removed by the President for any reason whatsoever. Yet this latter principle is not clearly spelled out in the Constitution and was not firmly implanted in law until recently.

The Constitution does say, in article I, that the Houses of Congress shall have the sole power of impeachment and conviction, but it does not say that Congress has the sole power of removal. If the framers had intended the impeachment process to be the only method of removal, it would have been a simple matter to include a specific provision to that effect.

In other words, Congress is given the power of removal through the impeachment process as a powerful check against the other branches of government. This also is the only process by which Congress can remove an executive official or a Federal judge.

However, the Constitution does not prohibit other forms of removal within each branch, such as the President firing a Cabinet member or a panel of Federal judges removing another member of the Federal judiciary as is proposed in S. 1110.

S. 1110 attempts within the power of Congress under article III to regulate the judicial system, to provide a system under which the judicial branch can be administered and supervised by its own members and to enforce the good behavior constitutional standard for all Federal judges.

Mr. Chairman, we have some distinguished members that are going to appear here today for the American Bar Association and for the Attorney Generals of the States of this country. Professor Raoul Berger is also scheduled to appear as a witness during these hearings.

I don't propose to preempt or in any way duplicate the work of these distinguished witnesses and these distinguished legal scholars.

Therefore, permit me to mention just a few points about the good behavior standard, without going into all of the details. Whereas article I specifically provides for the removal of the President, Vice President, and all civil officers upon impeachment and conviction of certain crimes. Article III is silent on the question of removal of judges. It merely specifies that, "The Judges, both of the Superior and inferior Courts, shall hold their offices during good behavior." This tenure standard is different from the impeachment grounds set out in article I and it indicates that a separate means of removing judges was within the contemplation of the framers of the Constitution.

The "good behavior" standard was well rooted in the English legal system with which the framers were familiar. Indeed, it can be assumed that they were fully aware of its significance and that they used it in an historical context. As the framers knew it, the English system had three methods of removing judges.

First, Parliament could remove a judge by Bill of Attainder, by impeachment, or by joint address to the King. Second, prior to the Act of Settlement in 1700, the King could remove a judge almost at will. And third, and most important, judges and other officers holding office during good behavior, by patent from the King, could be removed by the judiciary through a writ of scire facias.

The framers undertook to build judicial independence into the Constitution as a part of the separation of powers. They did this by dealing with each of the three English methods of removal. First, they prohibited the President from removing Federal judges, although he was given the power to appoint them with the advice and consent of the Senate. Second, they limited the legislative removal power to the impeachment process, which is the only power of Congress to remove judges. Third, they provided that the standard for tenure of all Federal judges would be "good behavior," a term that had an ascertainable meaning at the time.

"Good behavior" with reference to an office imparted that office for the life of the grantee terminable only by the death or breach of that "good behavior." Since it was the English custom to provide for removal of judges who breached the "good behavior" standard by a judicial proceeding, it can be assumed, I submit, that the framers intended such a system to be permissible under the U.S. Constitution. Certainly they did not specifically prohibit it.

Another point should not be overlooked. Judicial independence in 1787 meant not so much the independence of judges from one another as it did the independence of the judiciary as a whole from the other branches of government—the King and the Parliament.

As Professor Berger has written about those days:

> . . . all the remarks in the several Conventions that bear on judicial independence, so far as I could find, referred to freedom from legislative and executive encroachments. No one suggested that judges must be immune from traditional judicial control.

Therefore, Mr. Chairman, it seems entirely logical that the framers knew that judges would be subject to control within the judicial branch, even though they were specifically protected from the President and from the Congress.

Mr. Chairman, if our judicial system is to reclaim and maintain the support of the American people, it is imperative that the "good behavior" standard be enforced in a meaningful fashion.

It is clear that impeachment is too cumbersome and impractical a mechanism to fill the void in most cases of abuse in the judiciary. While constitutional theories have been presented on both sides of the issue for several years, I firmly believe that the time has come for Congress to reject the use of protracted academic argument to avoid acceptance of our legislative responsibility in this area.

I know the subcommittee will give serious consideration to these issues, Mr. Chairman, and again I want to thank you personally for taking the initiative to hold these hearings. I know you have an extremely heavy workload in your subcommittee and in your other duties, and I'm grateful that you are giving time to this important consideration.

Senator Burdick. Well, thank you very much for your contribution this morning. You made a good statement and your closing

paragraphs indicate that, "constitutional theories have been presented on both sides of this issue for several years." That is quite true. This subcommittee, prior to my administration, engaged in lengthy hearings on this question and the question generally turned upon whether or not impeachment provisions or some other provisions could be used.

And that is the core of the argument. I don't think you'll find much dispute, even with the bar, and other people and citizens, that there should be some remedy to take care of an incompetent or unfit judge.

My question now to you is: We know one thing. We know that if we had a constitutional amendment, we could clear up this thing. If we don't have a constitutional amendment, we still may have argument for many years, probably finally going to the Supreme Court.

Why wouldn't the logical procedure be to introduce a constitutional amendment, and then we know we're on the right track and there isn't any question about that?

Senator NUNN. Mr. Chairman, I wouldn't object to the introduction of a constitutional amendment and would support such. I don't think it's necessary. I originally researched this subject about 3½ years ago. I did some studying before I ever ran for the Senate and I have done a lot more since I've been here.

There has been almost an evolution in legal thinking in the last 3 years on this subject—since the last time the Judicial Committee has had hearings on this subject. There are some very, very fine legal scholars, including Professor Berger, who will be here next week, who have done a tremendous amount of research on this. And the more I read of their findings, the more I'm convinced that a constitutional amendment is not necessary.

Now, I would support a constitutional amendment. I think that the preferrable way to proceed is by statute, by reason of the time element involved. A constitutional amendment would be very, very difficult to pass. We might be sitting here 10 to 15 years from now with it still lingering around.

I would like very much to see it dealt with by this kind of an approach. I'm certain that there's room for innovations and changes in the legislation that I have introduced. And I welcome those.

We would get a speedy decision from the judicial branch on a proposal of this nature. I don't think we'll have a long period of deliberation by the Supreme Court as to whether this approach is constitutional, if it becomes law. I think we will get to that point long before we could ever hope to pass a constitutional amendment in either Congress or through the States.

Senator BURDICK. Well, I understand your position, but we've been at this a good many years now. If constitutional amendment had been introduced when we had our hearings several years ago, this time could have been used. You're convinced that a constitutional amendment is not necessary, but others are equally convinced that one is necessary.

My point is that there's no question that if we had a constitutional amendment, we would resolve this issue. Without it, we still have a doubt.

Senator NUNN. Well, I'm sure we'll have doubt until the Supreme Court rules on it, but I think the Judicial Conference endorsement of this proposal, the fact that the American bar has endorsed this proposal; and the American judicature endorsement of this proposal, indicates that the preponderance of legal opinion is that it is constitutional.

I would say about the approach that you've outlined—perhaps we should have considered that approach with a new campaign law. We didn't wait around on the new campaign law to determine whether it was constitutional. And I would submit that there was considerably more doubt about the constitutionality of many of those provisions than there is about this proposal.

It was acted on; it was passed, and regrettably a lot of it has been ruled unconstitutional. I believe that there is such a preponderance of legal opinion that this is a constitutional approach, that we should give it a try. I believe that there will not be irreparable damage done if certain provisions of it were to be ruled unconstitutional. We provide for a very speedy appeal to the Supreme Court. And I would think that there would be no matter given more priority by the Court itself than an appeal of a case of a statute dealing with the inherent powers of the judiciary itself.

Senator BURDICK. Well, I've got two other questions for you. You mentioned the practical difficulties of a trial in the Senate, which is required in the case of an impeachment. Is this really a factor which should be taken into account in interpreting the Constitution in order to determine whether impeachment is an exclusive remedy for the removal of a judge?

Senator NUNN. I don't submit that as evidence of the constitutionality, one way or the other. I think that is a practical matter and demonstrates the need for an alternative remedy to impeachment. But I do not use that as an argument that this is a constitutional approach, no, sir.

Senator BURDICK. In other words, the practical difficulty wouldn't have anything to do with the force and effect of a constitutional amendment?

Senator NUNN. I agree with you completely and we have a lot of other cumbersome procedures that are not very effective in Congress, but that does not mean that they are either constitutional or unconstitutional.

Senator BURDICK. If proceedings before the Council on Judicial Tenure, as you recommend, are not confidential, is there a likelihood that the reputation or effectiveness of the judge, even if cleared, would be destroyed or severely impaired?

Senator NUNN. Mr. Chairman, according to my understanding of the legislation, as introduced, the proceedings would be confidential, unless the judge himself initiated a request to release the information. I think that if the judge himself wants to clear the record, he will be able to do that. Of course, if there is an appeal to the Supreme Court, there would have to be a certain amount of disclosure necessary for the adjudication of the appeal.

I don't think that is an avoidable kind of situation, but I would say that even in the worst possible case, on an appeal—there would

be a lot less disclosure by this method than there would by even a preliminary inquiry by Congress under the present system.

So I see this as a rather gigantic step toward the protection of a judge's constitutional and due process rights and his rights to not have his reputation harmed. Rather than a step backward, I think it's a giant step towards protecting that kind of consideration.

Senator BURDICK. You mean to say that a hearing and an eventual clearance of the judge is a giant step for him? Is that what you said?

Senator NUNN. Compared to the present alternative.

Senator BURDICK. As far as confidentiality is concerned, you live in Washington. It would be quite difficult to have a hearing like this and keep it confidential; wouldn't it?

Senator NUNN. Well, of course, these hearings would take place within the judiciary, the judicial branch. The Judicial Tenure Council would have the hearing.

The point I'm making is that the present system guarantees disclosure of whatever the complaint may be, no matter how spurious. Any hearing before the Congress, even in these days—on the House side at least—top secret information hearings appear in the papers the next day.

So I would say that the hearing in a judicial tenure council would have a much better chance of being confidential than a hearing before the House of Representatives of the Congress.

Senator BURDICK. Well, thank you very much for testifying today.

Senator NUNN. Thank you very much, Mr. Chairman.

Senator BURDICK. Our next witness is Andrew P. Miller, attorney general of Virginia, representing the National Association of Attorneys General. Welcome to the committee, Mr. Miller.

STATEMENT OF HON. ANDREW P. MILLER, ATTORNEY GENERAL OF VIRGINIA AND COCHAIRMAN OF COMMITTEE ON THE FEDERAL JUDICIARY OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. MILLER. I am pleased to appear today to testify on S. 1110, a bill which will provide a much-needed mechanism for the protection of the public from judicial misbehavior and incompetence.

I appear not only as attorney general of the Commonwealth of Virginia, but as cochairman of the Committee on the Federal Judiciary of the National Association of Attorneys General.

On December 14, 1974, the association at its winter meeting in Hot Springs, Ark., adopted a resolution endorsing in principle the provisions of S. 4153, the predecessor of S. 1110 and urged the Congress to adopt such legislation. I'm filing that resolution as an appendix to this testimony.

The Virginia constitution provides that judges may be impeached, as does the Federal Constitution, for malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor. A two-thirds vote of our Senate is necessary for conviction, which may result in removal from office and disqualification from holding any other office.

In addition to these provisions, article VI, section 10, of the Virginia constitution directs the creation by the General Assembly of Virginia of a judicial inquiry and review commission vested with the power to investigate charges against a judge which would be a basis for retirement, censure, or removal.

These charges would include the following: That the judge is mentally or physically disabled, that he has engaged in misconduct in office, that he has persistently failed to perform his duties, or that he is engaged in conduct prejudicial to the proper administration of justice.

Now, this section goes on to provide that the Commission may, if it is satisfied that the charges have merit, file a formal complaint with the supreme court of Virginia, which in turn shall conduct a hearing in open court and take appropriate action.

We have found that this system in Virginia has proven to be very effective. I'm advised that 35 or 36 States have similar laws, the precise number being unknown because of still ongoing adoption of such legislation. I can't verify this, but this last weekend, at a meeting of the American Judicature Society in Philadelphia, I was advised that the figure has now risen to 39.

By way of contrast, Federal judges are at this time subject to no such review. Article III, section 1, of the U.S. Constitution does provide that judges hold office during good behavior. But the only mechanism thus far provided for their removal is by impeachment.

As the court of claims noted in *Clark* v. *United States*, 82 F.Supp. 564 (1947):

> If a judge wishes to resign he may do so, whether the President wants him to or not; and on the other hand, neither the President nor anyone else has the legal right to force him to resign.

Thomas Jefferson, in the early days of our Republic, recognized that impeachment was not an effective way to rid us of misbehaving or incompetent judges when he wrote of them, "impeachment is a bugbear which they fear not at all." Indeed, history has borne out Mr. Jefferson's prescience.

Columnist James J. Kilpatrick, writing in March of 1975, noted that in the past 187 years, there had been only 9 judges impeached and only 4 convicted, the latest in 1936. Now, I submit that it would be fatuous to suggest that only these 9 judges failed to meet appropriate standards of judicial conduct during this period.

As you are aware, the only provision of the United States Code by which some measure of supervision may be had over Federal judges is 28 U.S.C. 372(b), which provides that whenever any Federal judge who is eligible to retire for disability does not do so, and a certificate of his disability signed by a majority of the Judicial Council of his circuit is presented to the President and the President finds that such judge is permanently mentally or physically unable to discharge efficiently all of the duties of his office, he may appoint an additional judge for that circuit or district, and the disabled judge is then reduced to the lowest seniority. This certificate of disability, however, even if accepted by the President, does not accomplish the retirement of a judge, since under present law he can be removed only by impeachment. This provision is clearly inadequate.

And some have suggested that limited tenure may be an answer to judicial misconduct and incompetence. A substantial number of States, including Virginia, have fixed tenure for their judiciary. I do not believe that limited tenure provides a solution to the problem.

The fact that so many States have found it necessary to enact legislation regulating the conduct of judges, many of whom serve for a term of years, manifests that regardless of length of term, there must be a means by which judges may be removed for misbehavior and disability. It follows, a fortiori, that judges with life tenure should be subject to appropriate behavioral review.

Finally, the view has been advanced that S. 1110 is unconstitutional in providing for removal of judges other than through the impeachment process. In light of the other testimony which has been received and will be received, I'm not going into those arguments in detail. But I take issue with the position just stated. The U.S. Constitution provides for judges to hold office "during good behavior." It also provides, inter alia, for removal of judges "on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." If a judge could be removed only through impeachment, the "good behavior" provision would be superfluous.

I think it's significant that in 1970, Associate Justice Rehnquist, then an assistant attorney general, thought that creation of "a new judicial commission to remove judges in cases of failure to conform with good behavior standards . . . is constitutionally permissible."

Further strengthening the constitutionality of the proposed bill is the provision for removal by the judiciary, rather than by the legislature or executive, thereby avoiding a problem of separation of powers.

It is for these reasons that S. 1110 is so important. No mechanism presently exists at the Federal level which is comparable to that of more than three-fourths of the States, despite the fact that decisions of Federal judges are indisputably of such far-reaching importance.

This proposed legislation provides a means for protecting the quality and integrity of the judiciary from adverse consequences of individual action. If adopted, there would be in most instances a superior alternative to impeachment, which is a cumbersome and unrealistic check upon the judiciary, particularly when dealing with instances of mental or physical disability.

The existence of the proposed procedure would permit charges of judicial misbehavior or disability to be dealt with in a thorough, efficient, and impartial manner. Moreover, it would be a powerful deterrent to judicial misconduct and would encourage voluntary retirement for disability. Its most salutary result, I submit, would be the enhancement of public confidence in the judicial process at the Federal level.

Now, Mr. Chairman, these remarks, as I indicated, were made by me as cochairman of the National Association of Attorneys General Committee on the Federal Judiciary.

In addition, I would like to make some very brief comments, speaking in my own right and not in my capacity as cochairman of that committee. The reason I say that is that, as you are aware, from the resolution attached to my testimony, the Association endorsed in principle the bill in question. But in my individual capacity,

I would like to say that I do not feel that members of the Supreme Court should be covered by the provisions of this act.

Not that they shouldn't be held to the same standard. However, I think that they're in a different position as to the degree of scrutiny to which they are subjected. The inherent difficulty in the Supreme Court judging one of its own members is, in my view, almost unsurmountable from the personal and professional standpoint.

We have a similar provision, as is contained in S. 1110 in our Virginia law. However, I have always had misgivings as to that approach. I think as far as the Supreme Court is concerned, that we must continue to rely, as we have in the past, on peer group pressure, if you will, and public pressure for assurance of acceptable judicial performance.

Second, in section 378(b)(2) of the bill, it is not at all clear as to what happens when there is a reference to a panel of the Council on Judicial Tenure which decides unanimously that the complaint should be dismissed or of which less than four members conclude that grounds for further proceedings exist. In my view, it should be spelled out that in these circumstances, the Council itself, rather than the Panel, should dismiss the complaint. There certainly is no reason to transmit the case at that point to the Judicial Conference, and yet, as the legislation is presently drawn, one might argue that that is the only possible further step which a panel could take.

Third, in section 379(b), page 8, line 1, the language on the record should, in my view, be clarified. I assume that this language means merely that a record would be kept. But if this is the case, the language is confusing and ought to be amended. And I suggest that after the word "and" on that line, the language should be inserted, "a record thereof shall be maintained."

The reason for the lack of clarity is that the Council on Judicial Tenure is to keep a record and it is not at all apparent as to whether or not that record somehow becomes involved in the proceeding before the Judicial Conference.

Fourth, as to section 379(f)(1), I believe there should be a right of appeal from any order of the Judicial Conference resulting in either censure or involuntary retirement of a judge. Obviously, a judge might decide not to appeal.

However, if the judge felt determination by the Judicial Conference was erroneous, he should have that option. Removal from the bench is clearly a more severe penalty than either censure or involuntary retirement, but the consequences of either are of sufficient magnitude, in my view, to justify the existence of a right of appeal.

Finally, since the Council on Judicial Tenure is not to be created by the election of all of its members until 180 days after date of enactment, it seems that in miscellaneous, section 8(a), (b), and (c), it should be made clear that the terms of members begin to run from that time—that is, 180 days after enactment, by which time all of the members will have been selected for the Council.

Also the rules which are to be adopted, will not come into being until 1 year after enactment, either at the Council or the Conference level. Consequently, it seems to me that it should be provided that no

written complaint with respect to judicial conduct would be received until 1 year after enactment of the proposed legislation. Mr. Chairman, that concludes my remarks and I'll be pleased to respond to any questions which you might have.

Senator BURDICK. Well, thank you very much, Mr. Miller, for a good statement. I'm interested in the provisions of the Virginia constitution which you mentioned. Is the Judicial Inquiry and Review Commission a part of the general assembly or is it a separate agency?

Mr. MILLER. It is a separate agency. And the reason why it is a separate agency established by our constitution is that it is not restricted to the judicial branch. I personally feel that if there were a commission similar to that proposed in Senator Nunn's bill, there wouldn't be a constitutional problem under our Virginia constitution in the absence of any reference to a commission, if the judiciary itself had the responsibility for policing its ranks.

However, under our Virginia constitution, the make-up of the commission includes nonjudges. There are two lawyers who are members of the commission and one individual who is a nonlawyer. For that reason, it was felt desirable to include a constitutional provision creating the commission at the time of the revision of our constitution in 1971.

Senator BURDICK. Do I understand, then, that the commission is composed of three members?

Mr. MILLER. No, sir. There are 5 members: 2 judges, 2 lawyers, and 1 nonlawyer.

Senator BURDICK. Does Virginia statutory law define what is meant by "misconduct in office" or by "conduct prejudicial to the proper administration of justice," or is that left to the commission to decide in each individual case?

Mr. MILLER. As I indicated in my testimony, there are certain bases for removal, censure or retirement, which are set forth in our constitution. However, these bases use extremely broad language and consequently there are not specific acts set forth in the statute which would form the foundation for a charge which would be taken before the commission. The commission must decide after investigation as to whether or not the offense, which is complained of, does comport with the general standards so that, as a consequence, the commission has to take additional action in the form of filing a formal petition with our Supreme Court.

Senator BURDICK. You say that 35 or 36 States have agencies similar to Virginia's.

Mr. MILLER. They are variously denominated, as you can well appreciate in the Federal system. Some are called boards; others, commissions. But there are entities which have been established for this specific purpose, I am now advised, in some 39 States.

Senator BURDICK. In the first page of your statement, you described the constitution. You said it:

> Provides that judges may be impeached for malfeasance in office, corruption, neglect of duty, or other high crimes or misdemeanor. A two-thirds votes of the Senate is necessary for conviction, which may result in removal from office and disqualification from holding any other office. In addition to these provisions, Article VI, Section 10, of the Virginia Constitution directs the creation

by the General Assembly of Virginia of a Judicial Inquiry and Review Commission vested with the power to investigate charges against a judge which would be a basis for retirement, censure, or removal.

Now, the essence of this is that the constitution itself provides both for impeachment and for the review commission. So to that extent, if we followed the same procedure here in Congress, we would provide the same things you provided in Virginia by constitutional amendment. If we did that I wouldn't see any problem with this, because this is made a part of the constitution itself and not a statutory act.

Mr. MILLER. As I mentioned a moment ago, sir, I think the reason why it was felt in Virginia that there had to be a provision inserted in the constitution providing for this commission, rather than to have one legislatively established by the general assembly without constitutional language which would support its creation, is the fact that the commission in Virginia does not consist solely of members of the judiciary. If it did consist solely of members of the judiciary, as is the case in proposed S. 1110, I don't think that the constitutional amendment would have been necessary.

Senator BURDICK. But the fact is that that was how it was created —through a constitutional amendment.

Mr. MILLER. There's no question about that and for the reason I just stated.

Senator BURDICK. So my point is that if we had a similar amendment on the Federal level for the Federal Constitution, there wouldn't be any question what we could do. And this is my question to the Senator who proceeded you. To be sure we're proceeding the right way, wouldn't a constitutional amendment similar to the one you had in Virginia be a sure way to proceed?

Mr. MILLER. It would be one way of proceeding, but very frankly I regard the legislation which is before this subcommittee to be an equally sure way of proceeding, because on the basis of my analysis of the Constitution and reading the testimony of individuals who addressed themselves to this problem in the past, there is no question in my mind but that the Supreme Court would sustain the constitutionality of this legislation.

Senator BURDICK. You are, of course, aware that there are others of equally opposite convictions?

Mr. MILLER. It seems to me the legal thinking in this area is moving more and more in the direction of the position which I have just stated.

Senator BURDICK. How many times has the Virginia Commission acted to remove or censure a judge?

Mr. MILLER. The pattern in Virginia has been that individuals against whom charges have been made, when those charges have been investigated by the commission and found to have some foundation, the individuals have retired from the bench rather than face a hearing before our supreme court. Although the commission came into being on July 1, 1971, it has not filed a petition, with one exception that I'm aware of, before the supreme court.

Senator BURDICK. In other words, they've had no actions for actual removal?

Mr. MILLER. There has been no removal from the bench pursuant to the provision. That is correct. This is not to say, sir, that there would not have been if the individual judges had not taken the action which I have just described and that is to retire from the bench. The proceedings before the commission are confidential. My office acts as counsel for the commission. However, the attorney who is assigned by me for this purpose does not discuss the individual cases with me for obvious reasons. He is the only individual in the office who is aware of the precise details of the charges. There have been references in the press, however, to certain instances which have led to charges being filed and, consequently, the bases for some of those charges is well-known.

Senator BURDICK. I'm sure that the fact that there are some proceedings is not secret as far as the press is concerned, although I presume they don't have the details? They know the proceedings are going on?

Mr. MILLER. From time to time, the press is aware that a proceeding is ongoing. That is correct.

Senator BURDICK. Can you furnish a list of the 35 or 39 States that you mentioned that had similar agency provisions?

Mr. MILLER. I would be pleased to do so, sir. That may take a few days, but I will see that it's transmitted as soon as I can obtain that information. [See table at end of Meserve testimony.]

Senator BURDICK. How would you distinguish between the term "bad behavior" and the term "bad judge"?

Mr. MILLER. I think that as far as behavior is concerned, we're talking in two areas, Mr. Chairman. First of all, you may have instances where a person has a mental or a physical disability of some sort which adversely affects the performance of judicial functions. Consequently, his behavior is not good in the context of what we expect from a judge holding that type of office.

There are also instances in which there does not appear to be any mental or physical disability, but the judge has become so imbued with his own self-esteem that he does not conduct judicial proceedings properly. Now, this is the case of hubris, if you will, of pride, of arrogance.

I think that when you talk about a "bad judge," there may be a sense of that term which can apply to a judge acting under disability or acting in an unwarranted fashion not under disability. On the other hand, I think the phrase "bad judge" is also frequently used by individuals who are disappointed with the types of decisions which are handed down.

This legislation, of course, does not get into that area at all. I yield to no one in my defense of judicial independence, whether at the State or Federal level. Because some people may not be happy with a particular decision, clearly that should not be the grounds for a proceeding before a council on judicial tenure at the Federal level or a commission at the State level, such as we have in Virginia.

Senator BURDICK. Senator Scott?

Senator WILLIAM L. SCOTT. Mr. Chairman, I have no questions. I'd like to add a word of welcome to a fellow Virginian, our attorney general. I didn't know you were going to be here, Andy. I would

have been here a little bit earlier. And it is good to see you and have the benefit of your views on this legislation.

Mr. MILLER. Senator, I appreciate your courtesy in being here this morning.

Senator BURDICK. The staff has just a few more questions.

Mr. MILLER. Certainly.

Mr. WESTPHAL. I don't know whether to call you, "Mr. Miller" or "Andy" or "General." I'll probably call you one of the three and——

Mr. MILLER. Well, as long as your calling is limited to those three, I would be very happy, whichever you may choose.

Mr. WESTPHAL. Well, I'm sure your answers won't change whatever I might call you.

Mr. MILLER. They will not.

Mr. WESTPHAL. General, I'd like to call your attention to a part of the bill that you haven't mentioned and that's on page 14, section 3 of the bill, the new proposed section 372(a). The essence of that reads as follows:

> A Justice or judge of the United States may be removed from office—upon a finding—that the conduct of such Justice or judge is or has been inconsistent with the good behavior required by article III, section 1, of the Constitution.

My question is: Do you feel that, in acting on this legislation, the Congress should attempt to define what is the absence of good behavior, or in effect, define what is bad behavior?

Mr. MILLER. I think it would be extraordinarily difficult, if not impossible, to define specifically bad behavior in such a way as to cover every possible type of conduct which might fall within the meaning of that term. "Good behavior," of course, is the language used in the constitution. It seems to me that it might be desirable to spell out generally what the absence of good behavior might be, as we have done in Virginia, using language similar to that found at the bottom of page 1 and the top of page 2 of the written testimony which I've just given.

Mr. WESTPHAL. Well, that is the point that I'm trying to make here. As I have reviewed this bill, the only thing that the bill states as grounds for removal is "conduct inconsistent with good behavior." Now certainly if a municipality in Virginia passed an ordinance that said, "Any citizen of this community whose conduct is inconsistent with the good behavior required of citizens of this community shall be subject to 30 days in jail or so much in the way of a fine," I dare say that your office would say that that is unconstitutional because it is too vague and uncertain as to what conduct is prohibited to a citizen. Do you agree with that—that that language borders on being so vague and uncertain that it is itself unconstitutional?

Mr. MILLER. Let me respond to that in two ways: First of all, I don't think that reference to what standards may be necessary with respect to the adjudication of criminal charges is appropriate here. The reason is that historically—and I haven't had a memorandum prepared on this—there has been a distinction drawn between the specificity of the language necessary constitutionally when an individual is charged with a crime, on the one hand, and second, the language which may be appropriate in establishing standards for the continuance in some civil office. We're talking about the latter situation here.

Second, it is the language of the Constitution—"good behavior"—we're talking about. The Council on Judicial Tenure and the Judicial Conference will be composed of judges assigned to this particular function under S. 1110. That function I do not regard as anything much different from the responsibility which a judge has sitting on other cases in applying the language of the Constitution.

The phrase "due process" or the phrase "equal protection," in my view, is just as broad as the phrase "good behavior," and yet as a consequence of decisions made by the judiciary over periods of time, those phrases have become specific in their meaning because of the judicial precedents interpreting that phraseology.

Mr. WESTPHAL. Now, our Federal Constitution, as you know, specifies that the grounds for impeachment are treason, bribery, or other high crimes and misdemeanors. Professor Berger makes the argument that that language does not address itself to so-called ordinary crimes and misdemeanors which, if committed by a public official, should be grounds for either impeachment or removal in some way. Now, then, if Congress is going to implement the good behavior clause, it seems to me that something must be in there, as you have suggested, comparable to what your Virginia proceedings contemplate, and that is some term such as "malfeasance, misconduct in office, persistent failure to perform his duties, or conduct prejudicial to the proper administration of justice."

It seems to me that that kind of legislative definition of what is meant by "good behavior" or the absence thereof, is of great importance in fashioning a removal system such as this bill contemplates. Would you agree with that?

Mr. MILLER. I would say, sir, that your comments might be a very strong argument for proceeding with the enactment of S. 1110, rather than to write a constitutional amendment. It seems to me that there is a constitutional basis for S. 1110, and that the type of statute which is proposed here is clearly desirable. Now, the question you asked, of course, goes beyond that, as to the language which should be contained in the statute.

The Constitution does make reference, as you suggest, to "treason, bribery, and other high crimes and misdemeanors," as a basis for impeachment. What is a high crime and misdemeanor is obviously a matter which we know a good deal more about now than we did several years ago. But nonetheless, I think we recognize an ambiguity there.

It seems to me that the proposal which is made here is complementary to the impeachment process. There is no reason why, in an appropriate case, that impeachment should not be had. On the other hand, the term "good behavior," in my view, is far broader than the specific grounds for impeachment which are set forth in the Constitution.

Consequently, as I think I mentioned earlier, I do endorse the idea that there be some phraseology contained in the proposed new section 372(a) which would give a more specific meaning to the phrase "good behavior." It seems to me that this is a very appropriate legislative function in interpreting the Constitution in the context of this particular proposal.

Mr. WESTPHAL. Now, in that connection, the Virginia constitution—or possibly it's the legislation that implements it—talks about

"misconduct in office," and talks about the "persistent failure to perform his duties," and those clearly are references to the behavior of the judge in connection with his official function or his office as a judge. They look to his official conduct, rather than his private or personal conduct.

On the other hand, the fourth basis of removal or censure in Virginia is "conduct prejudicial to the proper administration of justice." I would take it that that language is broader than his official conduct or behavior and it could reach the private or personal conduct or behavior of a judge in the sense that the judge in his personal life may act so scandalously or maybe have habitual intemperance so that that personal conduct of his reflects upon his official duties and diminishes his ability to be a judge that the citizenry of the State would look up to and respect. Do you agree with that?

Mr. MILLER. I would say, sir, that one would have to make a distinction, as perhaps you just did, in private conduct which does not have a direct bearing on the capability of the judge to impartially and fairly administer justice and private conduct which does have such a bearing. There are activities which may be private in nature which individuals in the community may or may not approve of, but in the final analysis do not reach the point where they effectively interfere with an individual who is engaged in the performance of a judicial function.

The type of thing that I have in mind is as follows: Let's assume that a State has parimutual betting and the judge goes to the racetrack. Well, there may be individuals in the community who feel that he shouldn't do that, but because of the fact that the conduct is lawful in the State, it does not seem to me that that would fall within the rubric of the phraseology we're just talking about. Virginia doesn't happen to have parimutual betting. I'm just using that as an example.

On the other hand, if the State did not have parimutual betting and a judge did place bets occasionally, then he would be in a position of engaging in conduct which, as a judge, he might have to rule on if an individual were apprehended doing such an illegal act in the State and brought before him.

Therefore, it seems to me under those circumstances, that that type of conduct would have a negative effect on the appearance of justice fairly and impartially administered.

Mr. WESTPHAL. But under those facts it might be a ground for the judge disqualifying or recusing himself rather than a ground for the Commission to actually remove him from office.

Mr. MILLER. Well, the idea of a judge recusing himself on the ground he was engaged in illegal conduct strikes me, with all respect, as being a little farfetched.

Mr. WESTPHAL. Well, I'll give you another example. And I think a few examples are of some value here in legislative history. In my own experience, I know of a situation where there was a judge who had a drinking habit. The way he carried on his drinking habit was that when he felt the need to go on one of his binges, he would leave his own county. He would go to Florida or he would go to New York and he would be gone on a toot and he'd return and then he'd go back on the bench.

Now, nobody in his community ever saw him drunk on the street or on the bench or anywhere else in the community. However, part of his duties required him to preside over juvenile matters and occasionally he had to handle matters where juveniles were charged with possession of beer and things of that kind.

The community reputation or knowledge of his drinking habits was such that it just destroyed his effectiveness as a judge to preside over juvenile matters of that kind. The juveniles would virtually laugh at anything that he would hand down because they knew what kind of a monkey he had on his back.

Now, in that kind of an example, would that be the type of personal conduct or behavior on the part of a judge which, under your Virginia law, would be prejudicial to the proper administration of justice, in your opinion?

Mr. MILLER. I'm not a member of the Commission, of course, but it seems to me that you pose a hypothetical which would not be found in the real world. If an individual had the type of drinking problem which you suggest—and that is, with some frequency, he went off and just got absolutely soused for a weekend even if out of the community—the chances of his not drinking at all during the week, I would find, somewhat surprising.

If what he did, however, was as you described it, and his activities were not unlawful and they did not affect his performance on the bench, the idea that he had some idiosyncracies, even though people in the community were aware of those idiosyncracies, would not strike me as rising to the level whereby he should be censured for his conduct.

Mr. WESTPHAL. That situation I gave you isn't all that hypothetical. I know of an instance where a governor who had the removal power was faced with that very situation. So that the consideration of this legislation inevitably would involve the Congress, either by statutory language or in legislative history, trying to indicate to what extent this Council on Judicial Tenure would have authority to take into account situations like you supposed or that I supposed or this idiosyncratic behavior of men who happen to hold the judicial office.

There's a fine line there someplace and you can see that the Congress is going to have to wrestle a little bit with its responsibility in trying to enact legislation which has clear enough standards and guidelines in it so that this fine line is not crossed.

Mr. MILLER. Well, of course, I think that it would be appropriate to have the type of general language I've just referred to in the staute to give more specific meaning to the phrase, "good behavior." I believe, however, that it would be a mistake for the Congress to go too far in that regard and try to specify every situation which the imagination of the legislative mind can come up with.

I think that you have to legislatively establish the standards and then, with respect to the application of those standards, leave the Council on Judicial Tenure and the Judicial Conference with the ability to draw a line in a specific instance.

Whether an individual should be censured or the written complaint brought against him dismissed, I'll grant, in some instances, may be a close case. But after all, the judges who are going to sit

on the panel are used to drawing fine lines of that sort every day of the week in the performance of their judicial function.

Mr. WESTPHAL. In that connection, you've suggested that the language of the bill, as drafted, is a little bit fuzzy on this question of whether the Council on Judicial Tenure can itself dismiss an unsubstantiated complaint against the judge or whether it must merely make a recommendation to the Judicial Conference, that it, the Conference, dismiss the complaint.

And you suggest that the language be cleared up to be sure that the Council itself, finding that a complaint is unsubstantiated or frivolous, can itself dismiss the complaint.

Mr. MILLER. Yes, sir. As I understand the language, it is quite clear that the Council on Judicial Tenure, upon receipt of a written complaint, which on its face or with very little investigation, appears to be completely frivolous, can dismiss the complaint at that point.

But once the matter is referred to a panel of 5 of the Council on Judicial Tenure, there seems to be an ambiguity as to dismissal of the complaint. Would the panel do it? Would the panel refer the matter to the Council as a whole? Or would the panel necessarily have to forward the matter to the Judicial Conference for final disposition?

Mr. WESTPHAL. Now, then, this leads to this further thought. I take it that it's contemplated that this Council on Judicial Tenure, like many of the State commissions that have been created to cover this same area, would have the power to receive and make whatever investigation is appropriate, concerning complaints filed by citizens or other officials against a particular judge.

If that is their power and if they have this power to dismiss unsubstantiated or unfounded complaints—either before or after the hearing—should that complainant have a right to seek review by requesting the Judicial Conference to consider the complaint that he has lodged with the Council on Judicial Tenure?

Mr. MILLER. I think that's a close question.

Mr. WESTPHAL. If there is no such right of review on the part of the claimant, you run the risk, then, that in the wrong hands or for the wrong reasons that the Council itself could conduct a whitewash operation of some kind.

Mr. MILLER. As I just said, it's a close question. But if I were making a decision as to how it should be resolved, I'd have to analyze it this way. I think we fully recognize—and goodness knows, as attorney general, I have some familiarity with this—the number of petitions for writs of habeas corpus, and the number of 1983 actions which are filed with respect to State judicial or administrative action which have absolutely no grounds at all. There would be a temptation in the functioning of the Council on Judicial Tenure to say that, "Well, what's going to happen is that people are going to be bringing charges that are absolutely groundless in many instances and yet it's going to take an enormous amount of judicial time in order to process these charges."

My preference in response to your question—I recognize the competing interests involved—is that there should be the right of appeal to the Judicial Conference from a decision of the Council as far as

the complainant is concerned. When a letter comes in complaining about the conduct of a State official, I look into the matter. Then I write a letter back explaining why the particular conduct was taken and that's usually the end of it. Sometimes I get a letter in response saying they appreciate the investigation which has been made by my office and, consequently, they're satisfied, even though they might not agree with what was done.

So it seems to me that it may be something of an ad terrorem argument to suggest that all but a handful of dismissals by the Council, will not be the conclusion of the matter at that stage without any further proceedings.

Mr. WESTPHAL. Based upon your experience in the matters that you've handled as attorney general of Virginia, would you agree that the Council on Judicial Tenure, if it determines that a complaint is unsubstantiated, should notify the complainant that that has been their determination?

Mr. MILLER. I don't think there's any question about that. And also to give some explanation as to why that decision was made, because I'm afraid that if it was just a one-sentence communication—that it was dismissed—that that in itself might lead to subsequent appeal. I'm not talking about an extended analysis such as sending the complete results of the investigation—but a brief statement as to the grounds of the dismissal. In my view that would maintain the faith which the public should have in the operations of the Council.

Mr. WESTPHAL. And so your experience has been that when the complainant receives an answer and an explanation of what action the council has taken, that, even though he has a right to appeal, that usually satisfies him. It is only the most serious cases that probably would be appealed in the event that the council dismissed the complaint in the first instance?

Mr. MILLER. As far as citizen complaints, that is correct, sir. As far as inmates in correctional facilities, that statement would not be correct in some instances because there's very little else for such individuals to do and consequently many of them occupy themselves by simply filing papers.

But with reference to the type of complaint we would ordinarily receive from citizens in the community against judges, I think in most instances that procedure would satisfy them. Frequently the complaint arises from ignorance as to why the public official was required to do what, in fact, he did.

Mr. WESTPHAL. I have no further questions.

Senator BURDICK. Senator Scott?

Senator WILLIAM T. SCOTT. Isn't the situation in Virginia with our trial judges having 8-year appointments considerably different from the Federal system, where holding office "during good behavior" is ordinarily considered as life tenure? Is it really fair to draw a comparison between our State procedure and the Federal law?

Mr. MILLER. Well, the point I would like to make on that, Senator, is that even with limited terms such as we have in Virginia—as you say, at the circuit court level, 8 years, at the Supreme Court level, 12 years—most other States have similar provisions. And yet both Virginia and most other States have found it necessary to establish

some mechanism, whether it be a judicial inquiry and review commission or called by some other name, because of the fact that during those 8 or 12 years or whatever term a judge may have, there is always the possibility of a physical or mental disability which affects judicial functions or misconduct on the part of the judge, apart from such disability.

Senator WILLIAM L. SCOTT. Now, would you express an opinion as to whether or not the Congress has the authority to set up a Judicial Review Council that could remove a Federal judge from office against his will? Is this within the legislative realm of the Congress or is impeachment the only recourse? In the event that the judge does contest the matter, can he be forced out of office in the absence of a constitutional amendment in your opinion?

Mr. MILLER. In my opinion, a sitting judge can be removed from office if, in fact, he does not meet the "good behavior" standards set forth in article III, section 1, of the Constitution.

Senator WILLIAM L. SCOTT. That's under impeachment, isn't it?

Mr. MILLER. No, sir.

Senator WILLIAM L. SCOTT. You're saying that without impeachment you feel that he can be removed?

Mr. MILLER. Yes, sir. I don't think there's any question, as far as the phrase "good behavior" is concerned, that it is far broader than the grounds for impeachment which are set forth in the Constitution.

The difference is that up to this point we have not moved, as I believe we should have sometime ago in this country, to provide legislatively a mechanism, pursuant to the "good behavior" phraseology in the Constitution for retiring, removing, or censuring judges who do not meet acceptable standards of judicial conduct, but whose activities do not reach the point of where they've been convicted of treason, bribery, or high crime or misdemeanor.

Senator WILLIAM L. SCOTT. Well, I appreciate your point of view. Now, are there cases where judges have been removed since the establishment of our judicial system against their will without impeachment proceedings? Now, I realize that many have resigned, but are there any cases where a federal judge has been removed from office except by the impeachment process?

Mr. MILLER. There have been four removed by the impeachment process. Those are the only ones that I'm aware of who have been removed, the reason being that Congress has not established the type of mechanism which is the subject matter of S. 1110.

Senator WILLIAM L. SCOTT. Well, I'll say in all candor that I hope you're right and I hope we do have the authority and I think we're talking about a subject where we can't say, with any degree of definiteness, whether the Congress has this authority or not. I certainly have reservations as to what we can do in the absence of a constitutional amendment. I'm glad to hear your view on anything else that you care to add on that, because to me that's the crux of the matter.

I proposed a constitutional amendment, as has our senior Senator from Virginia, Senator Byrd. We have a difference as to whether it should be 8 or 10 years before they must be reappointed by the

President and reconfirmed by the Senate. But if there is an easier way to do it, I would certainly favor the easier way.

I just feel that an act like S. 1110 would be found to be contrary to the Constitution. But perhaps you could expound further on that.

Mr. MILLER. Well, I would say as to the proposal which you've just mentioned, that the effect of that proposal, if adopted, would be essentially to put the Federal judiciary on the same basis as most of our State judiciary and that is to serve for a term of years.

However, I do not believe that would reach the point which S. 1110 attempts to resolve, and that is, within a term of years, suppose a judge becomes incompetent or suppose he engages in misconduct? I think—and we, as you well know, in Virginia have so determined—that one ought not wait until the end of that term and then have a confirmation hearing at which point it would be decided whether the judge would be reelected.

On the contrary, through the judicial inquiry and review Commission in Virginia, appropriate charges would be brought before the commission, as they would before the Council on Judicial Tenure here. Consequently, regardless of the fate of the constitutional amendment to which you've just referred, it seems to me that this legislation is essential.

As to the constitutionality of the legislation, I alluded earlier to the fact that, from my observation, there is a very strong trend in the thinking of legal scholars in support of the proposition that legislation such as S. 1110 is indeed constitutional.

Of course, the way to resolve this issue would be to adopt the legislation and let the Supreme Court pass on it. I do not feel, as I mentioned earlier, that the Supreme Court should be covered by this legislation because it seems to me almost impossible for a court to be a judge of one of its own members. Therefore, it seems to me that, as far as the Supreme Court is concerned, the country is going to have to rely on the impeachment mechanism.

As to the determination of the constitutionality of the legislation, it also makes it somewhat easier if the Supreme Court does not have a prospective personal interest in ascertaining the constitutionality of the bill.

Senator WILLIAM L. SCOTT. Actually, if we thought that through, if the Supreme Court would hold that the Congress has the power to remove the lower Federal court judge, that that would be a precedent for further legislative action by the Congress, whereby it could legislate to remove a member of the Supreme Court?

They couldn't very well say, "You can do it for a district court judge and a circuit court judge," but then when it came to them, say, "You can't do it to us." Hasn't it already established a precedent? Is that a reasonable point of view or would you comment on that?

Mr. MILLER. I would say this, sir. That under this legislation it is very true, if it were adopted and the Supreme Court declared that the legislation was constitutional, as I think it would, then Congress at some later time might extend the coverage of the legislation to Supreme Court Justices.

The extension to Supreme Court Justices, however, in my mind is undesirable, not for constitutional reasons, but for very practical

reasons that, it seems to me, that it puts the Supreme Court in almost an impossible position in judging the fitness of one of the other members of the Court.

As you are aware, under the legislation as proposed, the Panel of the Council on Judicial Tenure cannot consist of judges who are of the same circuit of the judge whose conduct is being questioned, and I think for very good reasons.

Senator WILLIAM L. SCOTT. Well, Mr. Chairman, I appreciate the views of our attorney general and once again I apologize for not being here when he started testifying.

Senator BURDICK. Just one more question. The Judicial Inquiry and Review Commission in Virginia is constitutionally authorized. It's part of the Constitution?

Mr. MILLER. It is part of the Constitution, but I trust I satisfactorily explained why it was written into the Constitution.

Senator BURDICK. I just want the fact established.

Mr. MILLER. Yes, sir.

Senator BURDICK. Now, my next question is: How many of the other 35 or 36 States had their Commission constitutionally authorized?

Mr. MILLER. Mr. Chairman, I will get that information for you. I do not have it here, but along with a list of the States which have this type of board or commission, I will include information as to the number of States of that total which have a constitutionally based commission in the sense of a specific requirement that such a commission be established.

Senator BURDICK. Thank you very much.

Our next witnesses are John A. Sutro, of San Francisco, and J. Michael McWilliams, of Baltimore, representing the American Bar Association. Will both of you gentlemen appear at the witness table?

Mr. SUTRO. Thank you, Senator Burdick.

STATEMENT OF JOHN A. SUTRO, CHAIRMAN, STANDING COMMITTEE ON JUDICIAL SELECTION, TENURE AND COMPENSATION OF THE AMERICAN BAR ASSOCIATION

Mr. SUTRO. Senator Burdick, I appreciate the opportunity to appear before you. My name is John Sutro.

Senator BURDICK. Glad to see you again.

Mr. SUTRO. Thank you, Senator Burdick. I am a past chairman of the American Bar Association Standing Committee on the Federal Judiciary and presently am Chairman of the American Bar Association Standing Committee on Judicial Selection, Tenure, and Compensation. With my on my right is Mr. J. Michael McWilliams, who is a member of the Standing Committee of the American Bar Association on Judicial Selection, Tenure and Compensation.

We appear here today representing the American Bar Association. The House of Delegates of the American Bar Association, at its meeting on August 1975, at Montreal, adopted the following resolution: "The American Bar Association supports in principle the enactment of the Judicial Tenure Act, with a recommendation to the sponsor that the bill be amended to eliminate its application

to the Chief Justice of the United States and the Justices of the Supreme Court and that the Standing Committee on Judicial Selection, Tenure, and Compensation is authorized to represent the American Bar Association" at this hearing today.

It is of the utmost importance to the administration of justice that we have a strong Federal judiciary. The American Bar Association supports this legislation because it is a big step forward in assuring a strong Federal judiciary.

The American Bar Association, however, does not believe that the Chief Justice of the United States and the Justices of the Supreme Court should be included in the statute. The Association is of the view that it would be inappropriate for the judges of the inferior courts to pass judgment on the action of the Chief Justice of the United States or a Justice of the Supreme Court, and, further, the Judicial Conference of the United States has no jurisdiction over the Chief Justice and Justices of the Supreme Court.

I will address myself to the desirability of S. 1110 and what the experience has been in California, whose Constitution was amended by its electorate in 1960 to establish a commission to recommend to the Supreme Court of California the removal, retirement or censure of a judge. Mr. McWilliams, after I have completed my testimony, will discuss in detail the provisions of S. 1110.

This statute is desirable legislation. As Senator Nunn stated when he introduced the bill: "No branch of government is immune to an abuse of power." The President and Members of Congress are answerable to the people through the elective process. Our judges, on the other hand, are appointed for life tenure and hold office during good behavior. Presently, impeachment is the only remedy for the removal of a Federal judge. It is a slow and cumbersome process. In our 200 years, only nine judges have been impeached by the House and only four convicted by the Senate.

The last trial was 40 years ago. And I think we can all agree that during the past 40 years there have been Federal judges who should not have remained active judges for any of a number of reasons, be they physical disability, loss of mental capacity or for conduct less than good behavior.

Mr. Chief Justice Burger in 1958, then a judge of the U.S. Court of Appeals, spoke at the Attorney Generals Conference on Court Congestion and Delay on the need for keeping the Federal judiciary staffed with men and women who possess the physical and mental vigor which is indispensable to an effective system of justice.

The Chief Justice said:

> I would not presume to say how many United States judges now in active service are not physically able to perform their work adequately, but every observer knows there are more than a few.

There should be a means other than impeachment to remove from the bench a physically disabled or mentally incapacitated judge or a judge whose conduct is less than good behavior.

The U.S. Senate has more important business than taking the time-consuming process of determining whether a judge is mentally or physically incapable of discharging his duties. And I submit that

such a judge may well not be impeachable. Query is he has not maintained "good behavior" in the sense that those words are used in our Constitution.

I say to you, sir, that there is an urgent need for a method to deal with those judges and today we do not have one. Also, there have been in the past, and there will be in the future, judges guilty of misconduct, but not such as to warrant removal from office.

S. 1110 provides a remedy for such cases. Today there is no single body to receive and investigate complaints against Federal judges. There is no practical way to remove, retire, or censure a Federal judge for misconduct or inability to carry on the duty of his office or because of a permanent mental or physical disability.

There should be a body to which the public can turn to have legitimate complaints considered. For the judges, such a body would dispose of unfounded complaints which are frequently due to misconceptions and misunderstandings about the judicial process.

S. 1110 provides, and properly so, that all business of such a body is confidential. There are further and additional advantages to S. 1110. When, at the confidential hearings before the commission on judicial tenure created by the proposed statute, the evidence makes clear that there's a sound basis for the charge, the judge may well resign or retire and thus avoid the stigma and embarrassment of public disclosure.

The proposed statute will serve two vital purposes: It will shield judges from unwarranted accusations and it will remove from the Federal bench judges who should not sit, but absent the statute, will continue to do so. It will strengthen the public confidence in the judicial process.

Now, if I may, Senator Burdick, I would like to say a few words about the constitutional amendment adopted by the voters of California in 1960 and how it has worked in that State.

The constitutional amendment created the commission on judicial qualifications. The commission recommends to the Supreme Court of California the removal, retirement, or censure of a judge for disability that seriously interferes with the performance of his duties or willful misconduct in office, or willful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The commission receives complaints from anyone—private citizen, government official, attorney, or grand jury. Its executive officer reviews each complaint and makes such investigations as he deems warranted. At bimonthly meetings the commission considers each complaint. It may request more information or a statement from the judge. It has the authority to subpena witnesses, request medical reports, and take evidence and make findings. After sifting and weighing all available evidence, the commission can recommend to the Supreme Court of California removal, retirement, or censure of a judge.

The commission can only recommend. Only the supreme court can censure, remove or retire a judge. I think some statistics are of interest. Since the commission came into being in 1961 and through

December of 1975, it received 2,186 complaints. Of those, 1,580 were unfounded or not within the jurisdiction of the commission.

In cases such as that, a letter with a short explanation is sent to the complainant and the file is closed. Confidentiality protects the reputation of the judge against irresponsible accusations. Of the 606 complaints which were deemed worthy of investigation, 395 were found to warrant contacting the judge against whom the complaint had been made.

When the judge is contacted, he is advised of the nature of the complaint and given an opportunity to respond. In 323 of these cases, there were no further proceedings for any of a number of reasons. For example, the judge gave the commission a satisfactory explanation, the commission was assured that the judge had corrected the error of his ways, or the commission was satisfied that it would be unable to prove the facts upon which the complaint was based.

When a case goes to a formal hearing before the Commission, the Commission can dismiss the complaint or can recommend censure, removal, or retirement to the Supreme Court of California. And as I said, only the Supreme Court has the power to censure, remove, or retire.

During the years of the existence of the Commission, 64 judges have resigned or retired rather than proceed to formal hearings before the Commission. The Supreme Court has censured five judges and ordered the removal of three.

As a matter of interest, I spoke to a number of judges in California. I spoke to the Chief Justice of California, Hon. Donald R. Wright, and he said to me, referring to the Commission, "It has worked absolutely miraculously in every instance. It has strengthened the public's opinion of the judiciary, all for the betterment of the administration of justice."

And Justice Tobriner of the State Supreme Court said, "The Commission is essential to the administration of justice. It has served as a means to ascertain and certify that judges are properly performing their duties." And then Justice Tobriner asked a question: "Why should judges be different from lawyers, doctors, and other professional men?"

Justice Murray Draper of our Intermediate Appellate Court, the Court of Appeal, was a member of the Commission for 9 years, 7 of which he was chairman. And he told me:

> The Commission has worked very well. If you don't take the bad apples out of the barrel, you spoil the whole barrel. If you don't remove from the bench judges who shouldn't be there, it's hurtful to the public's conception of the administration of justice.

As a matter of interest, I spoke to a superior court judge, Judge Walter F. Calcagno and Judge Albert Wollenberg, who is a presiding judge of the Municipal Court in San Francisco. They both agree with the views expressed by Chief Justice Wright and Justice Tobriner and Justice Draper.

I am confident that if all of the judges in California were asked to express an opinion on the Commission, the very vast majority would concur in the opinions of the justices and judges to whom I

spoke. California was the first State in our union to have such a commission. It has served its purpose well, so well, in fact, as has been stated to you this morning, Senator, over 30 States now have comparable laws.

These laws not only enhance the confidence of the public in the judiciary; they raise the caliber of the judiciary. If you have any questions, Senator Burdick, that I could answer, I'll do my best to do so.

Senator BURDICK. Thank you, Mr. Sutro, for a very excellent statement. One of the questions I want to get to concerns the fact that you and the attorney general, Mr. Miller, who testified before you, testified about constitutional provisions. The panel that was set up in Virginia was set up under a constitutional provision. And apparently this Commission on Judicial Tenure in California was also set up by a constitutional amendment.

Mr. SUTRO. Yes. It was, Senator Burdick.

Senator BURDICK. So this is one of the problems that is going to confront us: whether we can do this by an—I know we can do it by constitutional amendment—but whether we can do it by enactment. That's the essential question.

Mr. SUTRO. I personally believe—and I share the views of the attorney general of Virginia—that such a statute, if enacted by the Congress of the United States, would be constitutional.

Senator BURDICK. But both States used the constitutional route.

Mr. SUTRO. I might say, Senator, that the commission in California, as in Virginia, is made up of judges, lawyers, and laymen. The Council proposed by S. 1110 would create, in effect, a court, the Judicial Council on Tenure, a court made up of judges of the United States.

So they are substantially different. When the Tydings bill was before the Senate, Justice Rehnquist, then in the Office of Legal Counsel of the Attorney General, testified. And I have his testimony here. And he had no difficulty in reaching the conclusion that such a statute would be constitutional.

And I would respectfully refer you, sir, to Justice Rehnquist's statement before the committee at that time.

Senator WILLIAM L. SCOTT. But, Mr. Chairman, might not the Justice have a different point of view as a member of the Supreme Court than he did as an official in the Department of Justice?

Mr. SUTRO. Well, Senator Scott, I'd be looking into a crystal ball, but having great respect for Justice Rehnquist——

Senator WILLIAM L. SCOTT. Well, I'm not talking about an individual. I'm just talking about a Government official, one that's working with the Department of Justice, and one that's a member of the Supreme Court under lifetime tenure. There might be—not considering this man at all, for as far as I know, he's a very fine gentleman—but in the Department of Justice, the man who is in charge of the Department is the Attorney General.

Mr. Rehnquist was under command of others when he was working within the Justice Department. He didn't have the freedom to express his own will.

Mr. SUTRO. Well, I would respectfully say, Senator Scott, that I think that Justice Rehnquist, when he was in the Office of the Attorney General of the United States and gave his testimony, was expressing his views. I think that he would certainly do so as a Justice of the Supreme Court of the United States.

But I would also say, in addition to that, that the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary submitted a memorandum at those hearings and reached the same conclusion. I'm sure, you're aware of that.

I don't have any difficulty with the constitutionality of such a statute. As I say, you have a court. I should repeat what I said. I do not believe—the American Bar Association—does not believe that Justices of the Supreme Court of the United States should be included within the statute, for the reasons I gave, which I think are sound reasons.

But here you would have a court of judges passing on the complaint, if you will, respecting a judge, whether it be conduct less than good behavior, whether it be physical incapacity or lack of mental capacity.

Senator BURDICK. I was merely pointing out, Mr. Sutro, that in the two instances that we've had this morning, where you've had these commissions, both were established by a constitutional act, not by a legislative act.

Mr. SUTRO. I recognize that, Senator Burdick. And the question of constitutionality has constantly been before the Senate that has considered both the Tydings bill and is considering this proposed statute. And as I say, to my knowledge—as I say, Justice Rehnquist, the Special Committee, the witnesses today, I think, all agree that such a statute would be constitutional.

Senator BURDICK. Well, wait a minute. In the Tydings hearings, there was a learned judge that took the opposite position—and his name was Sam Ervin.

Mr. SUTRO. I say, "here today," Senator. I know there are arguments that can be advanced, as in any lawsuit, on both sides and they're logical and make sense. But I think the end result would be that such a statute is constitutional.

Senator BURDICK. Well, we'll hear from Mr. McWilliams and we'll have many days yet to go over this very important question. I think it's very important.

Mr. SUTRO. It certainly is.

Senator BURDICK. Mr. McWilliams?

STATEMENT OF J. MICHAEL McWILLIAMS, MEMBER, STANDING COMMITTEE ON JUDICIAL SELECTION, TENURE AND COMPENSATION OF THE AMERICAN BAR ASSOCIATION

Mr. MCWILLIAMS. Mr. Chairman, and members of the subcommittee, I very much appreciate the opportunity to appear before you today in support of S. 1110, the proposed Judicial Tenure Act.

The Standing Committee on Judicial Selection, Tenure and Compensation is the committee of the Bar Association which has studied

in depth the proposed Judicial Tenure Act. It is this committee which recommended to the Association's House of Delegates the adoption of the resolution related to you by Mr. Sutro, our chairman.

The review and deliberations of our committee prompted a number of queries and comments, both major and minor, with respect to the bill. It is my purpose today to discuss these and, in some cases, offer suggestions, for whatever assistance they may be.

Before getting into a more specific discussion of the bill, however, I would like to take a minute and add a further word with respect to our position that the Judicial Tenure Act should have no application to the Chief Justice of the United States and the Associate Justices of the Supreme Court.

We agree, as Mr. Sutro has indicated, with the position of the Judicial Conference of the United States, that the impeachment process is sufficient for the Supreme Court. The major reason for such legislation such as S. 1110 is to provide for the inferior Federal courts a much-needed procedure for censure and involuntary retirement and to provide a removal mechanism which is not as cumbersome and unwieldy as impeachment.

What concerns me most about the inclusion of the Supreme Court is the fact that ultimately it is the Supreme Court itself, by virtue of the appeal provided in the bill, which determines whether or not a Justice remain on the bench. It does not seem wise for the appeal of an order of the Judicial Conference removing a Justice to be determined by the eight other members of the court with whom he has been closely associated.

Concern about the natural human tendency to be overly sympathetic—and perhaps less objective—in a case involving a close associate is reflected elsewhere in the bill by the exclusion from participation in an inquiry or determination of any judge of the same court or circuit as the judge whose conduct is the subject of the inquiry.

Furthermore, it is quite possible that evidence as to the behavior of a Justice might come from testimony of those who know the situation best—his brother Justices. In addition, although it is not spelled out in the bill, presumably a Justice who is appealing to the Supreme Court from an order of censure, involuntary retirement, or removal, would not sit in the determination of the appeal. If the vote on the appeal were four-to-four, I assume the usual rule of affirmance would prevail and the action of the Judicial Conference would be upheld, because a tie-breaking vote could not be cast.

More importantly, however, this possibility is inconsistent with the rest of the bill, which requires at least a majority vote in favor of removal by the Judicial Conference and a four-to-one vote by any panel.

In short, we believe very strongly that the proposed Judicial Tenure Act should not be applicable to the Chief Justice of the United States or to the Associate Justices of the Supreme Court.

Now I would like to address specific provisions of the bill and will cite parenthetically, by page and line numbers, where appropriate. The composition of the Council on Judicial Tenure, under S. 1110, is more representative and less susceptible to pressure than the

smaller appointed removal commission proposed by Senator Tydings in his legislation introduced in the Senate in 1969.

The composition of a Panel of the Council and Committee of Nine of the Judicial Conference is set out in the bill. But it is not entirely clear whether the composition is to be the same with respect to the panels and the committees to be designated by the Council and Judicial Conference, respectively, when dealing with the question of failure to assign judicial duties under section 380.

It is our view that the standard of conduct, deviation from which provides grounds for removal or censure, is better legislatively defined, by the incorporation of the constitutional "good behavior" standard, as provided in S. 1110, than by legislatively attempting to interpret the constitutional standard, as was proposed by Senator Tydings.

An additional thought occurred to me a few moments ago when a question with respect to this issue was raised. Now, it seems to me that the judges will be judging the judges and it would be better to let them determine on an ad hoc basis what is or what is not "good behavior" under the Constitution. I have great concern over the difficulty of defining "good behavior" legislatively because it would be so easy to overdefine it or underdefine it.

However, with respect to involuntary retirement, there is a question. The required finding for voluntary retirement, found at page 14, line 22, is that "the Justice or judge is unable to discharge efficiently one or more of the critical duties of his office by reason of a permanent mental or physical disability."

There is an additional standard with respect to habitual intemperance as a permanent disability, found at page 15, line 3. In order for habitual intemperance to be considered a permanent disability, it must be of a nature which, "seriously interferes with the performance of any one of the critical duties of a Justice or judge."

Therefore, a determination is first required that the habitual intemperance seriously interferes with the performance of any one of the critical duties before it can be considered a permanent disability.

A second determination is then required that such permanent disability affects the Justice or judge to the extent that he is unable to discharge efficiently one or more of the critical duties of his office. This could result in a finding that he has a permanent disability because his habitual intemperance seriously interferes with his performance, but not to the extent that he is unable to discharge efficiently one or more of the critical duties of his office.

The determinative factor for involuntary retirement is the Justice's or judge's inability to "discharge efficiently" and the prior required finding that habitual intemperance seriously interferes adds nothing. Perhaps a better approach would be legislatively to find that habitual intemperance is a permanent disability without requiring an additional subjective finding.

Under the bill, in the usual course of events, the Council on Judicial Tenure would take only one action as a body. That action would be the dismissal of a complaint upon finding it frivolous, unwarranted, or insufficient in law or fact, after preliminary investigation by the Chairman.

The bill does not speak to whether a majority vote is required for such action, although voting requirements with respect to other actions are set out elsewhere in the bill. But if a complaint is not so dismissed, the Chairman must appoint a five-member panel and that Panel must hold a hearing to consider it.

Although the quorum requirement with respect to the Panel is three members, the Panel may transact business only upon the concurrence of at least three of its members. When the Panel votes to determine whether grounds exist for involuntary retirement, removal or censure, four of the five members of the Panel must concur.

This appears to be the intent of the bill, although the language is not entirely clear. Perhaps it would be clearer if the words "for a determination" were inserted in lieu of the words "to affect a recommendation to the Judicial Conference of the United States," in lines 11 and 12 on page 4.

Any recommendation with regard to the findings or determination of the Panel is required to be transmitted directly to the Judicial Conference. The use of the word "any," at page 5, line 4, prior to "recommendation," creates the impression that a recommendation is not mandatory.

However, since the Judicial Conference does not convene to hear the matter under "receipt of a recommendation," page 7, lines 19 and 20, it is clear that a recommendation from the Panel is mandatory. What is not clear, however, is whether a Panel of the Judicial Tenure Council can dismiss a complaint on its own after a hearing or whether it can only recommend dismissal to the Judicial Conference.

It may be argued that, inasmuch as the Council has the power to dismiss a frivolous complaint at the outset, a panel thereof has the same power. A contrary argument can be made to the effect that since the Panel only represents one-third of the Council, it cannot or should not be able to dismiss on its own.

Additionally, the power of the Judicial Conference to dismiss is set out in the bill at page 9, line 16. But dismissal is not referred to with respect to recommendations by the Panel to the conference, page 7, line 19.

In any case, the power, if any, of the Panel to dismiss is not clear. Perhaps a provision should be added to the effect that if the Panel, after a hearing, believes the complaint should be dismissed, it should make its recommendation to the Council and avoid another hearing by the Judicial Conference. Presumably, although not spelled out in the bill, actions with respect to dismissal would require only a majority vote.

Actions by the Judicial Conference or by the Committee of Nine, appointed pursuant to section 379 are required, in all instances, to be pursuant to majority vote. This causes a degree of inconsistence at this step of the proceedings because a majority of the Committee of Nine, of course, is 5, whereas a majority of the Judicial Conference would be 13.

Presumably, "Jimmy the Greek's" advice would be to seek a hearing before the whole Judicial Conference rather than a Committee of Nine, because the odds are that it would be more difficult to convince 13 men of bad conduct than 9.

There appears in the bill no requirement for a quorum with respect to the meetings of the Committee of Nine or the Judicial Conference.

The first notice required under the bill is notice to the judge of the date for a hearing on his fitness. There is no requirement—and perhaps there should be—that the judge be notified upon the reference of a complaint to the Panel.

The complainant should also be notified if the complaint is dismissed as frivolous at the outset. Under the bill, the determination of the Panel must be sent to the judge in question, to the complainant, and to the Judicial Conference.

Notice of any hearing before the Judicial Conference is required only to be "adequate," page 8, lines 5 and 6, whereas the notice regarding a hearing by the Panel is to be "not less than 30 days" before the hearing date, page 4, line 18.

Perhaps in the interest of consistency, the notice requirement of "adequate" should be expressed in terms of "30 days" or "30 days" in terms of "adequate."

Notice of the Judicial Conference determination is required to be sent to the judge in question, but not to the complainant. This appears wise, in all events, other than dismissal, until the matter is finally determined.

I think in this connection, an earlier question brought another thought to my mind in connection with whether, if dismissed at the outset, the complainant ought to have some right to appeal that dismissal to the Panel and further to the Judicial Conference and to the Supreme Court.

I don't believe so. And in my judgment, the complainant is analogous to the complaining witness in a criminal prosecution and the prosecutor is, in fact, the State's attorney or a branch of the government.

Section 4 of the bill provides for a mandatory review by the Supreme Court, upon petition, of an order of the Judicial Conference removing a Justice or judge from office. We believe this is good because it requires the Supreme Court to act and become the ultimate decisionmaker.

However, although a Justice may also appear from an order that he be censured or involuntarily retired, a judge may not. It is unlikely that a censure or involuntary retirement would mean less, on an individual basis, to a judge, than either would mean to a Justice.

If Justices and judges are to be on an equal footing, so to speak, within a removal mechanism, that equal footing should extend to the right of appeal. And if the Supreme Court is not included in the measure, a provision should be made for a judge to appeal an order for censure or involuntary retirement to the highest level of the judicial branch.

Such a change will necessitate a change in the provisions relating to the stay of Judicial Conference orders pending appeal, appearing at page 9, line 24 to page 10, line 3.

In my prepared statement, there are some comments with respect to minor, or technical problems. I won't consume the subcommittee's time with that, at this time, if that is agreeable.

One further thought occurred to me while listening to the preceding testimony with repect to confidentiality. It strikes me that

there is an inconsistency under the bill because everything remains confidential until it is appealed to the Supreme Court, at which time the necessary materials would have to be made public.

The inconsistency I find, is that if the rationale for the confidentiality of proceedings before the panel and the Judicial Conference is to avoid injury to a justice or judge's reputation, in the event the complaint is dismissed, that same rationale must logically apply to proceedings before the Supreme Court.

I do not believe that the Supreme Court would be precluded from changing its rules to provide for such confidentiality and release of material upon a final finding that the judge is unfit by the Supreme Court or if they dismiss it and a judge wishes it released, for it to be released at that time.

That concludes my statement, Mr. Chairman. I'd be happy to respond and perhaps answer any questions.

Senator BURDICK. Thank you, Mr. McWilliams. Since you've just testified, I think I'll ask you a few questions and then I'll come back to Mr. Sutro. I want to thank you for suggesting perfecting amendments in the language. They certainly will be considered.

You state that the Justices of the Supreme Court should be exempted from the bill. If this is done, then the involuntary retirement provisions would not apply to any Justice either, would they?

Mr. MCWILLIAMS. No, sir.

Senator BURDICK. Do you think they should?

Mr. MCWILLIAMS. Not in the same context as they would apply to the other judges. I don't know. I understand the question that you're asking and it's a difficult one. There ought to be some provision for retirement of Supreme Court Justices—involuntary retirement of Supreme Court Justices—when they are so permanently disabled that they cannot conduct the business of the court.

Senator BURDICK. I'm a bit afraid of something else, too. We represent people. And what do we say to a constituent who says, "Well, you provided for the removal of district judges, circuit court judges, but you leave immune the nine men up there." What do we say to them?

Mr. MCWILLIAMS. Well, with respect to removal and censure, I believe that you could respond to them that the impeachment process is available.

Senator BURDICK. Yes. But it's available in the case of circuit court and district judges, too.

Mr. MCWILLIAMS. That is true. But it does not necessarily have to be used if this procedure were available and I think it is important to preserve the impeachment process just for the Supreme Court because they are the highest court in the judicial branch of the government.

And when a member of the highest court of that branch is to be removed, I think it should be through the impeachment procedure.

Senator BURDICK. Why can't they censure one of their own members?

Mr. MCWILLIAMS. Well, I think that they could through another procedure that might be set up.

Senator WILLIAM L. SCOTT. Mr. Chairman, would you yield the floor?

Senator BURDICK. Yes, yes.

Senator WILLIAM L. SCOTT. It's interesting to note that article III does say, and I quote, "The judges, both of the Supreme Court and inferior courts shall hold office during good behavior." They've lumped them together and make no distinction in the Constitution.

Senator BURDICK. Certainly.

Mr. MCWILLIAMS. I don't think there's any question about the fact that both are subject to the "good behavior" standard.

Senator BURDICK. But you want to take them out and you want to make an exception. And it's difficult because they're members of the same court and may have to sit upon the conduct of one of their members. Well, that's nothing new. We in the Senate have had to do that. We've had to bite the bullet—misbehaviors of our own Members at times.

Mr. MCWILLIAMS. But that is with respect to your own Members, not with respect to any inferior branch of the legislative——

Senator BURDICK. I thought we were talking about the Supreme Court, now, the nine members.

Mr. MCWILLIAMS. Well, that's true, Mr. Chairman. And I think that with respect to this bill, our point is that if there is to be a removal and involuntary retirement and censure process such as the one proposed in this bill, that process should not apply to the Supreme Court.

Senator BURDICK. Oh, I understand that. But I'm arguing, "Why shouldn't it?"

Mr. SUTRO. For two—if I could interrupt, Senator?

Senator BURDICK. Yes.

Mr. SUTRO. I think for two very good reasons, which I stated at the outset. And one is that it would be inappropriate for judges of the inferior courts to pass judgment on the Chief Justice of the United States and the Justices of the Supreme Court and further——

Senator BURDICK. Why would it be inappropriate?

Mr. SUTRO. I submit that it would be inappropriate for judges of inferior courts—the U.S. District Courts, the U.S. Court of Appeals, Customs Court, Patent, and so forth—to pass judgment on the conduct of the judges who are their superiors and who review their decisions and have the duty to interpret the Constitution of the United States.

Senator BURDICK. But on appeal, the Supreme Court itself would decide whether they acted properly.

Mr. SUTRO. I personally believe that that is a valid reason. I can see your argument to the contrary. But I'll also make the observation that the Judicial Conference has no jurisdiction over the Chief Justice or the Justices of the Supreme Court.

Senator BURDICK. Well, this would give them jurisdiction, this act.

Mr. SUTRO. Well, if the act were enacted in its present form, it presumably would.

Senator BURDICK. Yes.

Mr. SUTRO. I think it would be unfortunate for——

Senator BURDICK. I'm just saying that I don't know how to answer somebody in my home town saying, "Why do you treat the district judge here in Fargo differently than you treat the Supreme

Court Judge? Why do you do that?" And it's going to be hard to explain that, particularly when the Constitution applies to both.

Mr. McWILLIAMS. I think we recognize that there is a problem and that we cannot address the problem in its totality at this time. This is one step and one giant step toward improving the judiciary by setting up a mechanism that would apply to the lower court judges.

I don't think that just because we haven't got the ideal answer with respect to how to handle the Supreme Court, that we should not take any steps at all.

Mr. SUTRO. Well, the constitutional standard of "good behavior" applies to all Justices and judges. This is an additional means of removing from the bench, either by retirement or removal, judges who might not be impeachable under the Constitution because their conduct, although not good behavior, was not such as to warrant conviction by the Senate—takes care of old age, habitual intemperance, senility and mental incapacity. And as Mr. McWilliams has just said, it is a giant step forward in assuring us of a strong Federal judiciary.

And I would also point out that we have literally hundreds of judges of the District Courts and Courts of Appeal and Customs Court and so forth and only nine Justices of the Supreme Court of the United States.

Senator BURDICK. Let's take another question. If a permanently disabled Justice refused to retire voluntarily, what can be done about it, other than impeachment? Or is that a ground for impeachment?

Mr. SUTRO. That's a serious problem that I have when I addressed the committee at the outset. Query: Is old age or mental incapacity not "good behavior"? That would be a decision for the Supreme Court of the United States to make, I guess, in a proper case.

But going back to what you just said, Senator Burdick, if the Justices of the Supreme Court are excluded from the statute, as we suggest they be, you would run into a problem with the Justice of the Supreme Court who is physically or mentally incapacitated and he refuses to step down.

Senator BURDICK. Well, then is an incapacitated judge or disabled judge—is that a high crime or misdemeanor?

Mr. SUTRO. I don't think so.

Senator BURDICK. Well, then, there's no way to remove him. It doesn't fall under any other category.

Mr. SUTRO. Well, I think you have to rely on the individual and the advice you'll get from his family and friends and if you look at the history of the Supreme Court, that has been the fact—that Justices who have become physically or mentally incapacitated have stepped down.

Senator BURDICK. Well, I would think that we would take care of the situation, as long as we're at it, and provide some machinery to take care of a disabled Supreme Court Judge, like we would a disabled District Judge.

Mr. McWILLIAMS. The answer there, Mr. Chairman, may be for the Supreme Court to provide by its own rule for some procedure within its deliberations to take care of one of its Justices.

And there certainly is a hole. There's no question about that.

Senator BURDICK. How could they do that by their own bootstraps? You'd either have to do it by the Constitution or by enactment. You can't do it that way—to be of any permanency. That's like saying they've agreed to voluntarily step down, but one of them doesn't want to step down. And 10 years from now, what do you do about it?

Mr. MCWILLIAMS. That is the hole——

Senator BURDICK. Well, I see we have a problem. Well, then, you're suggesting that Congress should not attempt to define "bad behavior."

Mr. MCWILLIAMS. That's correct.

Mr. SUTRO. It isn't defined in the Constitution, Senator Burdick. And I very definitely agree that the framers of the Constitution did not find it necessary to define "good behavior" and I don't believe it's necessary to define it in this statute.

The question of fact is for the Council, the Judicial Conference of the United States and perhaps ultimately the Supreme Court of the United States to determine.

Mr. WESTPHAL. May I interject here?

Senator BURDICK. Yes. You may interject.

Mr. WESTPHAL. No. They did not define in the Constitution "good behavior" or the opposite, "bad behavior," nor did the founders define what is meant by what is good for public welfare or for the common defense. But if the Congress has the power to enact this bill at all, it has that power under the necessary and proper clause whereby Congress can implement the constitutional language. Now, the suggestion that Mr. McWilliams has made is that Congress not attempt to define, even in broad language, as the Virginia Constitution does, what is grounds for removal or censure or involuntary retirement, but just leave it in the broad language of the Constitution—the absence of good behavior. Now, how do you get around that problem?

Mr. MCWILLIAMS. I think Attorney General Miller made a good point with respect to that. "Good behavior" is not constitutionally defined any further than its own statement and neither is due process or equal protection. These constitutional terms are terms that have been explained to us by the Supreme Court, which is the ultimate interpreter of the Constitution.

And we believe, in this instance, that it is appropriate to leave that determination where it's going to finally end up anyway—in the Supreme Court—rather than try to debilitate, perhaps, a statute by either over- or under-definition of the constitutional term.

Senator BURDICK. Senator Scott?

Senator WILLIAM L. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, I just wanted to read from some portions of the Constitution, as annotated. I think this is an excellent book that has been brought up to date from time to time. I believe this is the 1974 edition of the Constitution Annotated—no, 1972 edition.

And if you look at the literal text, the judges both of the Supreme Court and inferior court shall hold their offices during "good behavior." I don't find under the annotations of article III any definition at all. But then when I look back under "Impeachment," I find

that it's under the Executive Department. And it says—section 4 here of article II—"the President and Vice President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, and other high crimes and misdemeanors. Then we look at pages 574 and 575 under the annotations and it has a heading called "Judges." It says:

> Article III, Section 1 specifically provides judges with good behavior tenure. But the Constitution nowhere expressly vests the power to remove upon bad behavior. It has been assumed that judges are made subject to the impeachment power through being labelled "civil officers." The records of the convention made this a plausible, though not necessary, interpretation. And, in fact, nine of the twelve impeachments reaching trial in the Senate had been directed at federal judges. So settled, apparently, is the interpretation that the major arguments, scholarly and political, have concerned the question whether judges, as well as others, are subject to impeachment for conduct which does not constitute an indictable offense. And the question whether impeachment is the exclusive removal device with regard to judges.

Now, that's the end of the quotation. But then in a footnote on page 579, speaking of whether impeachment is the exclusive remedy, it says this:

> The issue has been obliquely before the court as a result of a judicial conference action disciplining a district judge, but it was not reached—*Chandler* versus *Judicial Council*, 382 U.S. 1003, 1966, in 398 U.S. 74, 1970.

Then it adds this interesting clause:

> Except by Justices Black and Douglas in dissent, who argue that impeachment was the exclusive power.

So apparently the only time any member of the Supreme Court has made any comment on this—these two judges indicating that it's the only remedy.

I'd be glad to hear any comments, but this is a very scholarly book, as you gentlemen probably know, that has been prepared by the Library of Congress and they've done extensive research. I think very highly of the thoughts that are expressed in the book—not in any way reflecting on the American Bar Association. But it's done, in my opinion, as impartially as matters can be researched.

Mr. SUTRO. The points you made, Senator Scott, are covered in this memorandum I referred to, which was prepared by the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary and presented at the Tydings hearings on the subject of constitutionality. And the points you have just read from that book are referred to in this testimony.

I said at the outset that the conclusion of the study was that such a statute would be constitutional. It was not intended by the framers of our Constitution that impeachment be the only process for the removal of Federal judges.

Senator BURDICK. But that subcommittee found itself in division, too.

Senator WILLIAM L. SCOTT. But now, is it correct, as indicated in the annotations, in the notes with the annotations, that the only time any Justice of the Supreme Court has spoken of this is the two judges who said that impeachment was the exclusive remedy?

Mr. SUTRO. Those were in the *Chandler* case, Senator Scott, where the Supreme Court did not take jurisdiction because the matter was

moot and I don't think that the expression by Justices Black and Douglas in that dissent really constitute a view of the Supreme Court—or any more than you can say that Justice Rehnquist's testimony before the subcommittee where he testified, while he was in the Attorney General's Office, that such statute, in his opinion, would be constitutional.

Senator WILLIAM L. SCOTT. I don't suggest at all that that's binding on the court. It is dicta. But nevertheless, it is an expression of opinion of 2 members of the Supreme Court of the United States——

Mr. SUTRO. That's true.

Senator WILLIAM L. SCOTT [continuing]. And apparently the only expression of opinion of any justice on the Supreme Court. Now, I've done no research and perhaps you could enlighten me if any Justice of the Supreme Court has ever commented, other than these two judges.

Mr. SUTRO. As I said, Justice Rehnquist, when he was in the office of the Attorney General of the United States did, because he was a lawyer then and——

Senator WILLIAM L. SCOTT. Well, with all due respect, I see a difference in an official—I spent 21 years with the Department of Justice and——

Mr. SUTRO. There's a difference.

Senator WILLIAM L. SCOTT [continuing]. I know how it operates and I can see a difference between——

Senator WILLIAM L. SCOTT [continuing]. A Justice of the Supreme Court and an employee of the Department of Justice, even though he's in the Office of Legal Counsel and is one of the higher officers. He's still subject to the Department of Justice and the Attorney General. He's not necessarily completely his own man. That's no reflection against the Justice.

Mr. MCWILLIAMS. Senator Scott, if I might add a word, it is certainly not clear which side of the question is the right side. I believe a good argument can be made that the language that civil officers shall be impeached only for bribery, treason, and other high crimes and misdemeanors, was directed toward the feeling of the framers of the Constitution that that would be the only instance in which the legislative branch of the government could interfere with any other branch of the government.

It was a separation of powers provision. And the procedure was made cumbersome and required to involve both Houses. And only with respect to bribery, treason, and other high crimes and misdemeanors could the legislature insert itself into the activities of the other branches. It has not been settled. I believe you're right. I don't believe in any other opinions that there has been a reference to that proposition, other than Black and Douglas' dissent.

However, I believe that the constitutional scholars come up on the side of the constitutionality of this proposal. The important thing, however, is that the issue is not going to be finally resolved until it gets to the Supreme Court and it's not going to get to the Supreme Court until there is a piece of legislation enacted which can test the issue before the Supreme Court.

Senator WILLIAM L. SCOTT. Well, now, would you have any doubt as to the constitutional amendment process, if you established tenure for the judges? Insofar as I know, the Constitution, at no time, has been declared unconstitutional, so if we make it a part of the Constitution, then there will be no question as to its validity.

You would agree with that?

Mr. MCWILLIAMS. Certainly it would be a novel finding if the Supreme Court held the Constitution unconstitutional. But I think that a constitutional amendment—we're all aware of the difficulties in amending the Constitution. If indeed such a constitutional amendment could be enacted and ratified, it would take a long time for that to happen.

We're faced with a problem in our judiciary. And the longer we take in addressing that problem, the more difficult it becomes. I argue that we ought to try first to enact a constitutional statute to be tested by the Supreme Court and if they find it unconstitutional, then we'll have to go the long road to a constitutional amendment.

Senator WILLIAM L. SCOTT. Mr. Chairman, let me conclude by saying that my mind is not made up as to what we should do and it may be that the witness is entirely correct in his supposition. But I have very serious reservations about the constitutionality of the proposal. Thank you, Mr. Chairman.

Senator BURDICK. I'd like to speak to what you said about time. The last time we had hearings on this, it was 1969 before Senator Tydings. It is now 1976, 7 years later, and nothing has happened.

It seems to me that if we had put a constitutional amendment in at that time, it would have been adopted by this time, because I think the public wants something like this. I really think so and I don't think you're going to have the troubles.

We know we can do it by constitutional amendment; we're certainly not sure by legislative enactment. That's one of the observations I'd like to make before we close.

Well, thank you both.

Mr. MCWILLIAMS. Thank you, Mr. Chairman.

Mr. SUTRO. Thank you, Mr. Chairman.

Senator BURDICK. We will recess until February 25.

[Whereupon, at 12:22 p.m., the subcommittee adjourned, to reconvene February 25, 1976.]

JUDICIAL TENURE ACT

WEDNESDAY, FEBRUARY 25, 1976

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick, chairman, presiding.

Present: Senators Burdick and Hruska.

Also present: William P. Westphal, chief counsel; Kathryn M. Coulter, chief clerk.

Senator BURDICK. This is the second day of the several hearings which have been scheduled on S. 1110, the Judicial Tenure Act.

The theory of this legislation is to give meaning to the provision in article III of the Constitution that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior."

The bill would create a Council on Judicial Tenure consisting of one judge from each of the judicial circuits elected by all the judges of that circuit, together with a member from each of the three special courts named in the bill. The 14-man body would be authorized to receive and investigate complaints made by any person concerning the conduct of justices or judges of the United States. The Council would have the power to hold hearings on any complaint deemed of such substance as to justify a hearing. If, in the opinion of the Council, there is cause to censure or remove the judge or to order the involuntary retirement of a judge, a recommendation to this effect would be made to the Judicial Conference of the United States which would hear the matter a new. In this capacity the Judicial Conference, or nine of its members so designated, would constitute a court for the purpose of hearing a complaint against the judge. The bill gives to the Judicial Conference the power to order the censure, removal, or involuntary retirement of a Justice or judge. The order of the Conference could be appealed to the U.S. Supreme Court. This, in essence, is the theory of this legislation.

In initiating this series of hearings, I took note of the fact that consideration of this legislation involves certain constitutional questions and certain policy questions, the nature of which I will not repeat at this time. The witnesses at our first day of hearings made several suggestions for various amendments which might perfect the bill as introduced. Senator Nunn, the chief sponsor of this legislation, in the testimony he gave to the committee, conceded that

amendments to the bill might be in order, depending upon the conclusion reached concerning the constitutional and policy issues.

To assist us in our consideration of this legislation, today's witnesses are Senator Jake Garn, the junior Senator from Utah, and Judge Robert A. Ainsworth, Jr., of the Fifth Circuit Court of Appeals, who appears on behalf of the Judicial Conference of the United States.

In order to facilitate Senator's Garn's legislative schedule, we have arranged to hear him as our first witness this morning. Is Senator Garn present? Welcome to the committee, Senator.

STATEMENT OF HON. JAKE GARN, U.S. SENATOR FROM THE STATE OF UTAH

Senator GARN. Thank you very much. I certainly appreciate the opportunity to appear before you this morning to testify on behalf of Senator Nunn's bill, S. 1110. In the interest of your time, Senator, I will summarize the majority of my testimony, but ask unanimous consent that it be included in the record in its entirety.

Senator BURDICK. Without objection, it is so ordered.

Senator GARN. This bill was first brought to my attention by Senator Nunn, and I must admit that my interest in it was prompted by a situation in my own State concerning a Federal judge by the name of Willis Ritter. He is the only Federal judge still serving beyond the age of 70 as chief judge of a district court and I have sponsored S. 1130, a bill to repeal the grandfather clause. So, S. 1110 certainly appealed to me, because it provides some means beyond the impeachment process of getting involved with high crimes and misdemeanors, or judges who are not serving well or competently, or judges who are having some other problems that are not impeachable offenses, but which warrant some action.

I sincerely believe this bill will provide a review process where, short of impeachment, there will be means provided under the Constitution and this legislation to provide for the removal of Judges.

This problem has been particularly acute in the State of Utah where the U.S. District Court has been the center of controversy for many years. Chief Judge Willis Ritter of that court has been controversial for over 25 years and he continues to create sincere questions in the minds of many people regarding his competence to serve. It seems to me that the type of problem posed by Judge Ritter's relationship with many members of the Utah State bar and the general public are the kind of problems that S. 1110 will solve.

I wish to emphasize that neither Judge Ritter nor any other judge be subject to review by a council on Judicial Tenure simply because that judge is controversial. We are not attempting to review actions that are controversial, but actions that are intemperate, incompetent, or otherwise appropriate for an officer of the Federal courts.

I also wish to emphasize that this testimony is not an effort to convict Judge Ritter in the Senate or in the press, but I do intend to draw this committee's attention to the situation in Utah and the urgent need for legislation such as S. 1110.

I have been a Member of the U.S. Senate for just over 1 year, and during that time I estimate that I have received at least one complaint per week regarding Judge Ritter. Most of these complaints are from persons who have experienced Judge Ritter's justice at first hand—lawyers, newsmen, grand jurors, interested citizens who have been in his court either as spectators or as witnesses, and families of defendants. Let me quote from a letter that recently appeared in the Ogden, Utah Standard Examiner:

> I had the displeasure of observing Judge Ritter . . . a few months ago and still can't believe what I saw and heard in his court. Before I spent time as an onlooker in his court, I believed in only one God, now I believe there are two.

I will save the time of the committee and not continue to read, but examples in my testimony, I could go on and on, Senator, with personal examples, but I will give you only one or two. When I was mayor in Salt Lake City I was called to testify as to why I had voted to place the Ten Commandments in front of the court building in Salt Lake City. The judge subsequently ruled that the Ten Commandments were unconstitutionally placed on public property. He was overturned instantly, as he is 82 percent of the time, in the appeal to the circuit court in Denver. But it was reported to me that after the court session he said, "Why would the mayor vote to put a dumb thing like the Ten Commandments in front of the court building?" My feeling is that there is nothing wrong with saying "Thou shall not steal" in front of the court building.

He abuses witnesses, he abuses attorneys; I got a call a couple of weeks ago from an attorney in Los Angeles who appeared before him and he said, "Senator, I have never ever been before a judge of this kind, he was hissing at me while I was making my remarks." I said, "What do you mean, 'hissing'?" He said, "Like a snake, he was going 'sssssss' all the time I was speaking."

Well, I suppose, Mr. Chairman, I should not get wound up, having been commissioner and mayor in Salt Lake City for 7 years, knowing all the stories—hearsay and otherwise—and being in his court, this man is simply unbelievable. He is a disgrace to the Federal judiciary and a disgrace to the Bar. So, I won't get wound up but just give you a little flavor. There are other examples in my written testimony.

In an article entitled "Newsmen Should Defend Freedom Against Ritter Court" in the July 9, 1975 "Deseret News", the columnist quoted with approval the conclusions of a university professor who felt that journalists should sue to have Judge Ritter's order prohibiting newsmen from even making sketches from memory overturned. He not only doesn't allow sketches in his court, he has ruled that artists cannot go outside of the court and make sketches from memory after they get back to their office.

The article further states that:

> No other state or federal court in the United States has a restriction as limiting as Judge Ritter's.

Judge Ritter's recent dismissal of a grand jury has raised a furor in Utah and Rod Decker of the "Deseret News" wrote an

excellent column entitled "Ritter Blocks Juries" in the December 10, 1975 edition; and I quote from that article:

> In the past five years, a grand jury has met in Utah's Central District only 81 days. During 1972, grand juries sat only one day, during 1973 not at all.
>
> That record is in sharp contrast to neighboring jurisdictions. In Arizona, two grand juries are always impaneled and sometimes there are as many as four. In Colorado, a grand jury is always impaneled, and a second one has been called if needed for special invesigations.
>
> Spokesmen for the offices of the U.S. Attorneys in those states said they had never heard of their grand juries being limited to specified cases. Nor, so far as they knew, had federal judges in their states arbitrarily dismissed grand juries before their term was up.

The Utah grand jury was working on an important criminal investigation but was dismissed before it completed its investigation. Many of the grand jurors, including the forman, have led the effort to get Judge Ritter to reverse the dismissal but all efforts have failed.

The January 1976, meeting of the Utah State Bar helps point out the controversy which the judge has created among lawyers. Six resolutions were introduced that dealt either with Judge Ritter or with Federal court administration. One resolution was tabled, two passed, and three failed. The successful resolutions urged Congress to pass S. 1110, the Judicial Tenure Act, and S. 1130, an act relating to the repeal of the "grandfather clause". The unsuccessful resolutions were as follows: first, by a vote of 100 to 71 the Bar defeated a call for an investigation into the impeachment of Judge Ritter; second, by a 106 to 64 vote it defeated a resolution to determine if Judge Ritter is physically and mentally fit to discharge his duties; and third, by 82 to 89 the Bar defeated a resolution calling for the peremptory challenge of a Federal judge.

It can be said of these resolutions that they reflect the very real dissatisfaction of lawyers with the process of impeachment and that many Utah lawyers simply do not favor the impeachment of Judge Ritter. Yet, it can also be said that there is turmoil in the Utah State Bar and that a process for reviewing the actions of Federal judges—apart from impeachment—is desperately needed.

I think it would be fair to say, and this is just my opinion, that if attorneys did not fear reprisals—even though there are secret ballots—the results would have been far different. If the Utah State Bar had voted for all of these resolutions, the reprisals from Judge Ritter would have been horrendous; the Bar simply didn't have the guts to vote. I don't think there are three or four attorneys in the State of Utah who didn't think the man should be removed from office.

So, I believe S. 1110 provides a just process for removal and I urge prompt action to insure its passage. Although I am bringing in the personal problems that we have in the State of Utah—a judge that I believe should be removed because he is a disgrace to the Federal Judiciary—this bill was certainly not started by Senator Nunn with Judge Ritter involved; he knew nothing of the situation at that time. The bill stands on its own merits, and I only use Judge Ritter as an example of a judge who probably could not be impeached, but certainly should not be serving on the bench. This

bill provides a means in this situation, and others as they may arise around the country, for the removal of a judge, short of impeachment.

Thank you very much, Mr. Chairman.

Senator BURDICK. Thank you, Senator. Are you a lawyer?

Senator GARN. No.

Stnator BURDICK. And you appear on behalf of the Nunn bill's Tenure Act?

Senator GARN. I'm sorry, Senator.

Senator BURDICK. Are you appearing this morning for Senator Nunn's Judicial Tenure Act?

Senator GARN. Absolutely. I am a co-sponsor of that bill and am appearing on behalf of S. 1110, I very much favor its passage.

Senator BURDICK. At this point, without objection, we will receive a resolution signed by the Utah State Bar in regard to the adoption and support of S. 1110.

Senator GARN. Thank you. Senator.

Senator BURDICK. Senator Hruska?

Senator HRUSKA. I have no questions. I appreciate your presence. Senator Garn, I have to catch up a little bit with these hearings. If I should have any additional questions, I will get in touch with you and maybe you could supplement the answers for the record.

Senator GARN. Thank you very much, Senator.

Senator HRUSKA. Thank you for being here.

[The written statement of Hon. Jake Garn is as follows:]

PREPARED STATEMENT OF SENATOR JAKE GARN

Mr. Chairman: I want to thank you and the members of the Subcommittee for the opportunity of speaking on S. 1110, the Judicial Tenure Act. The scheduling of these hearings will hopefully provide the needed impetus for greatly needed judicial reform.

The American judiciary is the best in the world, providing an equitable access to thousands of persons and rendering decisions grounded in a legal tradition and system unique in the world's history. However, the Congress must make a continuing effort to ensure that the Judicial Branch is equal to its task. Chief Justice Warren E. Burger in a January 3, 1976, statement emphasized the enormity of the Judiciary's burden with the following concrete figures: In 1970, each United States district judge had an average of 317 new cases pending before him, in 1975 the average was 402 new cases per judgeship, and it is estimated that by June, 1976, the average will be 450 new cases per judge. The Chief Justice's point was that Congress needs to provide more judgeships and he ended his statement with the following words: ". . . We can be optimistic about the prospects of justice in this country, provided we relate the burdens placed on the courts to their capacity to perform and provide the necessary tools and personnel."

I support the conclusions of Chief Justice Burger, but I want to emphasize another aspect of the problem. That other aspect is aspect of quality. The Judicial Branch must not only have the numbers to meet the steadily increasing caseload, but each of those judges must meet and maintain the highest possible standards of judicial excellence. S. 1110 addresses the problem of quality; a problem no less important than quantity, but more difficult to solve. I believe S. 1110 provides a wise and acceptable plan under which members of the federal judiciary may be removed from office without the agony of impeachment. The plan provides safeguards which will ensure the continuing independence of the Judiciary and without such safeguards any plan would be unacceptable.

At each step of the judicial review process proposed in S. 1110 there are inherent safeguards and the number of steps further insures against abuse. A

written complaint regarding any Justice or judge of the United States is first reviewed by the Chairman of the Council on Judicial Tenure. If he does not dismiss the complaint as frivolous, unwarranted, or insufficient in law or fact, the complaint is referred to a five-member panel of the Council. No complaint may be referred to the next level in the process—the Judicial Conference of the United States—without the concurrence of at least four members of that five-member panel. The Judicial Conference may act on any dispute referred to it or it may appoint a nine-member committee to act in its behalf. The Conference or its committee may then take action only by majority vote and such action may be appealed to the United States Supreme Court for final review. Persons who are the subject of such inquiries have the right to counsel, the right to confront and cross-examine witnesses, offer evidence in his own behalf, claim his privilege against self-incrimination, and exercise other rights and privileges afforded the accused. Additionally, all documents filed with and testimony taken by either the Council on Judicial Tenure or the Judicial Conference shall be confidential, notwithstanding any other provision of law, unless otherwise authorized by the person whose conduct is the subject of the proceeding.

At the same time the bill is providing these safeguards it provides sufficient flexibility and substance to permit the Council on Judicial Tenure, the Judicial Conference, and the Supreme Court to deal with the Justice or judge whose conduct has been inconsistent with the good behavior required by Article III Section 1 of the Constitution. The flexibility of the bill is demonstrated by the five options available to the Judicial Confeernce or its committee: It may dismiss the case; it may censure the Justice or judge; it may order the removal of the person from office; it may order the involuntary retirement of such Justice or judge; or it may remand the case to the Council on Judicial Tenure. It is hoped that such flexibility will permit the appropriate application of the self-disciplining power of the federal judiciary to each case on its own, unique merits. The Judiciary itself will be able to choose from five options that choice which will best protect the rights and responsibilities of the courts without relying on the House and Senate to police the Judicial Branch through the single means available to them—impeachment.

Sec. 3(a)(1) of the bill proposes a new section 372a to Chapter 17, of title 28, United States Code, and that proposal maintains the flexibility of the courts by refusing to define the "good behavior" standard which must be breached before a Justice or judge may be removed from office or censured. Such an approach is wise I believe because of the difficulties surrounding such a definition, but this restraint is balanced by provisions of the proposed amendment to Sec. 372(b) of Title 28, United States Code, which contains definitions of conduct which Congress finds as grounds for involuntary retirement. (See Sec. 3(b) of the bill.) Current law (28 U.S.C. 372(b)) provides for involuntary retirement if a judge is not able to "discharge effectively all the duties of his office by reason of permanent mental or physical disability" but the bill proposes that mental or physical disability that prevents a judge from discharging effectively "*one or more of the critical duties of his office*" be grounds for involuntary retirement. This is a discerning change; the requirement that "all duties" be effectively impaired is too high a standard for involuntary retirement since the impairment of "one or more" critical duties can render a judge incapable of effective, judicious conduct. Total incapacitation should not be standard required for involuntary retirement.

The bill also provides that "Habitual intemperance that seriously interferes with the performance of any one of the critical duties of a Justice or judge shall be deemed to be a permanent disability for the purposes of [the Act relating to involuntary retirement]." This vital section of the bill speaks to the problem that is most visible to the layman and perhaps most disturbing to the public and the Bar alike. Most members of the public do not understand the intricacies of the law, and most lawyers accept good faith disagreements regarding precedents and verdicts, but neither layman nor lawyer can understand nor accept a federal judge who consistently behaves intemperately and injudiciously. Such behavior is inconsistent with the finest traditions of American law and is unbecoming and unnecessary when lodged in the symbol of the law, the judge. The judge, of course, is not only the symbol of the law, but its flesh and blood enforcer. The American public—particularly in the age of Watergate—is demanding both symbols and realities that are above doubt and reproach and it is time we offered them a Judicial Tenure Act to ensure that the federal judiciary will meet that high standard.

The problem has been particularly acute in my state of Utah because the United States District Court for Utah has been a center of controversy for many years. Chief Judge Willis W. Ritter of that court has been the subject of the controversy for over twenty-five years and he continues to create sincere questions in the minds of many people regarding his competence to serve. It seems to me that the type of problems posed by Judge Ritter's relationship with many of members of the Utah State Bar and the general public will be the kind of problems that S. 1110 will solve.

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I also wish to emphasize that this testimony is not an effort to convict Judge Ritter in the Senate or in the press, but I do intend to draw to this Committee's attention the situation in Utah and the urgent need for legislation such as S. 1110.

I have been a member of the United States Senate for just over one year, and during that time I estimate that I have received at least one complaint per week regarding Judge Ritter. Most of these complaints are from persons who have experienced Judge Ritter's justice at first hand—lawyers, newsmen, grand jurors, interested citizens who have been in his court either as spectators or as witnesses, and families of defendants. Let me quote from a letter that recently appeared in the Ogden, Utah *Standard-Examiner*:

"I had the displeasure of observing Judge Ritter while on the bench a few months ago and still can't believe what I saw and heard in his court. Before I spent time as an onlooker in his court I believed in only one God, now I believe there [are] two. * * *"

"In the [*Standard-Examiner*] article, I take exception to [the statement that] 'faith in the judiciary should not be blemished by excessive attention to one individual.' I wonder how many individuals who have appeared before Judge Ritter and [their] loved ones feel about having faith in the judiciary system.

"* * * You say have faith in the judiciary system, [but] mister, he is the system."

That letter from the January 27, 1976, edition of the paper contains sentiment that is often expressed by my constituents. Judge Ritter is perceived to be an arbitrary dictator with little or no regard for the law or fair play. We must take special cognizance of the fact that the actions of a single federal judge are seriously undermining the faith of much of the population of Utah in the federal judiciary. As the writer points out, it is difficult to have faith in a system of law when the man who administers that law does not meet important standards of judicious conduct. We may pontificate about our legal traditions and progress, but too many Utahns are saying, "Mister, he *is* the system."

The problem faced by the United States Attorney's office for the District of Utah may be summarized by again quoting from the Ogden *Standard-Examiner*, December 21, 1975:

Chief Judge Willis W. Ritter has dismissed federal charges against six men after blitzing the U.S. Attorney's office with a calendar of twenty-three cases and giving the government only four days to prepare.

"The charges dismissed this week involved five cases ranging from arson in a forest to unlawful transportation of a firearm. Ritter handed U.S. Attorney Ramon Child the calendar late last Friday, giving the government attorneys only until Thursday to prepare the cases and bring witnesses to Utah.

"Child tried to get more time to prepare but Ritter curtly dismissed the charges against six of the men.

* * * * * * *

"U.S. Attorney Child did not lose the entire twenty-three case calendar, however, as Ritter continued many of the cases until January 5. Child had asked Ritter to grant delays on the entire calendar, saying the United Airlines strike was making it difficult to bring witnesses to Utah on short notice."

In an article entitled "Newsman Should Defend Freedom Against Ritter Court" in the July 9, 1975 *Deseret News* the columnist quoted with approval the conclusions of a university professor who felt that journalists should sue to have Judge Ritter's orders prohibiting newsmen from making even sketches

from memory overturned. The article further states that "No other state or federal court in the United States has a restriction as limiting as Judge Ritter's."

Judge Ritter's recent dismissal of a grand jury has raised a furor in Utah and Rod Decker of the *Deseret News* wrote an excellent column entitled "Ritter Blocks Juries" in the December 10, 1975 edition. I quote from that article:

"In the past five years, a grand jury has met in Utah's central district only 81 days. During 1972, grand juries sat only one day, during 1973 not at all.

"That record is in sharp contrast to neighboring jurisdictions. In Arizona, two grand juries are always impaneled, and sometimes there are as many as four. In Colorado, a grand jury is always impaneled, and a second one has been called if needed for special investigations.

"Spokesmen for the offices of the U.S. attorneys in those states said they had never heard of their grand juries being limited to specified cases. Nor, so far as they knew, had federal judges in their states arbitrarily dismissed grand juries before their term was up."

The Utah grand jury was working on an important criminal investigation but was dismissed before it completed its investigation. Many of the grand jurors, including the foreman, have led the effort to get Judge Ritter to reverse the dismissal but all efforts have failed.

The January, 1976, meeting of the Utah State Bar helps point out the controversy which the Judge has created among lawyers. Six resolutions were introduced that dealt either with Judge Ritter or with federal court administration. One resolution was tabled, two passed, and three failed. The successful resolutions urged Congress to pass S. 1110, the Judicial Tenure Act, and S. 1139, an act relating to the repeal of the "grandfather clause." The unsuccessful resolutions were as follows: first, by a vote of 71–to–100 the Bar defeated a call for an investigation into the impeachment of Judge Ritter; second, by 64–to–106 vote it defeated a resolution to determine if Judge Ritter is physically and mentally fit to discharge his duties; and third, by 82–to–89 the Bar defeated a resolution calling for the peremptory challenge of a federal judge. It can be said of these resolutions that they reflect the very real dissatisfaction of lawyers with the process of impeachment and that many Utah lawyers simply do not favor the impeachment of Judge Ritter. Yet it can also be said that there is turmoil in the Utah State Bar and that a process for reviewing the actions of federal judges—apart from impeachment—is desperately needed.

I believe S. 1110 provides such a process and urge prompt action to ensure its passage.

Thank you.

[The resolution of the Utah State Bar follows:]

Whereas on July 18, 1975, the Board of Commissioners of the Utah State Bar unanimously adopted a resolution approving in principle S. 1110, and

Whereas the Board of Commissioners of the Utah State Bar on January 8, 1976, again considered the substance of S. 1110.

Now therefore the Board of Commissioners of the Utah State Bar reaffirm its support of the purposes and objectives of S. 1110.

HAROLD G. CHRISTENSEN,
President.

Attest:
DEAN W. SHEFFIELD,
Executive Director.

Senator BURDICK. Our next witness is the Honorable Judge Robert A. Ainsworth, Jr., United States Court of Appeals for the Fifth Circuit.

Welcome, Judge Ainsworth.

STATEMENT OF HON. ROBERT A. AINSWORTH, JR., JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Judge AINSWORTH. Thank you, Mr. Chairman and members of the committee. I am pleased to be here this morning.

Senator BURDICK. You may proceed.

Judge AINSWORTH. Mr. Chairman, I am Robert A. Ainsworth, Jr., a judge of the United States Court of Appeals for the Fifth Circuit. I am appearing before your subcommittee in my capacity as Chairman of the Committee on Court Administration of the Judicial Conference of the United States. S. 1110 of the 94th Congress is substantially identical with S. 4153 of the 93d Congress, a bill which was referred to the Committee on Court Administration and was subsequently considered by the Judicial Conference of the United States at its March 1975 session. The bill is designed to establish a council of judicial tenure within the judicial branch of the government and to establish a procedure in addition to impeachment for the retirement of disabled Justices and judges of the United States and for the removal of Justices and judges whose conduct is or has been inconsistent with the good behavior required by Article III, Section 1 of the Constitution.

At the present time any complaints received within the judicial branch relating to the conduct of a Federal judge are referred to the chief judge of the circuit involved in his capacity as chairman of the judicial council of the circuit. Under Section 332 of Title 28, United States Code, each judicial council is charged with the duty of making all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.

Undoubtedly complaints against judges have been received by other branches of our governments, such as the Congress and the Office of the Attorney General. While we have no central collecting point of data on complaints received it is believed that the number of complaints have been few, and have largely come from persons who have not prevailed in their own litigation and are displeased with the results of a court's action.

As this committee knows, there have been suggestions over the years for some type of mechanism within the judicial branch for the establishment of a committee or commission to pass on complaints received relating to the conduct of Federal judges. In 1966 the Judicial Conference itself, through the Committee on Court Administration, drafted and circulated to the Federal judiciary for comment, alternative proposals for the establishment of a commission on judicial disability. One plan provided as a punishment or sanction that the Conference advise the Congress and the Attorney General of its findings. The other plan provided for the involuntary retirement of the judge concerned if the Commission found that the complaint of misconduct so warranted.

The bill now before your committee, S. 1110, provides for the establishment of a council on judicial tenure to be composed of 14 judges of the United States who would serve a 3-year term. Eleven of such judges are elected by the circuit and district judges of each circuit at the annual judicial conference. The other 3 judges are elected from the membership by the judges of the Court of Claims, Court of Customs and Patent Appeals, and the Customs Court.

The bill places upon the council the duty of receiving and investigating written complaints concerning a Justice or judge of the United States and to determine whether the complaint alleges grounds which would warrant (1) removal from office, (2) censure, or (3) involuntary retirement.

If after investigation it is found that the complaint is frivolous or insufficient it may be dismissed. Otherwise the complaint is referred by the council to a panel of 5 of its members for hearing. The Justice or judge concerned is entitled to notice, right to appeal with counsel and right to confront witnesses. Concurrence of 4 of the 5 panel members is required to impose sanction against the Justice or judge concerned. Such sanction is limited to a recommendation to the Judicial Conference for involuntary retirement, removal from office, or a censure.

The Judicial Conference of the United States shall have the duty to elect one of its members to be the presiding officer on any matter concerning the removal, censure or involuntary retirement of a Justice or judge. The Chief Justice is not permitted to participate in such action.

The Judicial Conference or a committee of 9 judges appointed by the presiding officer, shall sit as a court to hear any cause relating to the removal, censure or involuntary retirement of a Justice or judge. On receipt of a recommendation from the council on judicial tenure to this effect the presiding officer shall convene the Judicial Conference or the committee to hear and determine the recommendation. The bill provides that such a proceeding shall be de novo. The Justice or judge whose conduct is the subject of inquiry is again entitled to a notice to attend and to be represented by counsel.

At this stage of the proceedings the Conference or the committee may order any judge who is the subject of the inquiry to cease the exercise of judicial powers pending determination of the issue.

The Conference or committee is given the power by majority vote to order the censure of the Justice or judge concerned, to order the removal from office of such Justice or judge, or to order involuntary retirement, or to dismiss or remand any such proceedings to the council.

Appeal from the action of the Conference or Committee shall lie to the Supreme Court of the United States and the judgment shall be stayed if it provides for the removal of a judge or the removal, censure or involuntary retirement of a Justice. Proceedings are confidential although in the event of a finding that the conduct or fitness of the Justice or judge does not warrant removal, censure, or involuntary retirement, the proceedings at his request may be made public. In the event of involuntary retirement thereafter the judge so removed may apply to the Council on Judicial Tenure for the assignment of such judicial duties within his court as he is willing and able to undertake. Upon a finding by the Council that the judge is willing and able to undertake work which is not being assigned to him, the finding may be reviewed by the Judicial Conference.

The legislation also includes a proposed amendment to section 372 of title 28, United States Code, to provide that when any Justice or judge of the United States appointed to hold office during good behavior who is eligible to retire and does not do so and a majority of the Judicial Conference of the United States finds that such Justice or judge is unable to discharge efficiently one or more of the critical duties of his office by reason of permanent mental or physical

disability, including habitual intemperance, that seriously interferes with the performance of any one of the critical duties of his office, the Conference shall certify the disability of such Justice or judge and issue an order removing him from active service.

The action of the Conference ordering censure, involuntary retirement, or removal from the office of a Justice or removal from office of a judge whose conduct is inconsistent with good behavior shall be reviewed by the Supreme Court upon petition of the aggrieved Justice or judge.

After careful consideration of these provisions as contained in S. 4153, 93d Congress, the Judicial Conference of the United States at its March 1975 session, approved the legislation in principle without approving the specific provisions of the bill. The Conference went on to make five specific suggestions which it proposed that your committee take into consideration in studying the legislation now before it. These suggestions are:

One: That any reference to Justices of the Supreme Court be eliminated inasmuch as sufficient means exist through the impeachment process; further, that it would be inappropriate for judges of the inferior courts to pass judgment on an action of a Justice of the Supreme Court; and last, by statute the Judicial Conference has no jurisdiction over the Supreme Court.

Two: The Conference believes that neither a judge or a Justice of the United States may be removed from office except by the impeachment process.

Three: The Conference is of the view that following a hearing before a commission of the type proposed in this legislation and following review by the Judicial Conference of the United States and further review by the Supreme Court of the United States, mandatory or involuntary retirement of a judge for physical or mental disability—including habitual intemperance—may be ordered with the judge so charged being relieved of his judicial duties.

Four: The Conference sugests that a judge may similarly be retired mandatorily—or involuntarily—for serious misconduct and he may be relieved of any further judicial duties.

Five: The Conference suggests that the censure of a judge following a hearing before such a commission with review and appeal may be imposed as a less severe sentence than mandatory or involuntary retirement.

Mr. Chairman, the foregoing suggestions were proposed by the Committee on Court Administration and were adopted by the Judicial Conference of the United States. They are submitted for the serious consideration of your committee in considering S. 1110.

I repeat that the legislation has been approved in principle only by the Judicial Conference of the United States. I wish to stress, Mr. Chairman, that the Judicial Conference expressly disapproved the inclusion of a Justice of the Supreme Court and was in agreement that the legislation should not provide for the removal of a Justice or a judge from office. We respectfully suggest that under the Constitution this may be done only by the impeachment process. With these considerations in mind, the Conferenee approved the

concept of a Council on Judicial Tenure within the judicial branch of government bearing in mind the other provisions which were expressly voted by the Conference and which I have set forth in this statement.

Mr. Chairman, this concludes my prepared statement, I will be pleased to answer your questions.

Senator BURDICK. Senator Hruska?

Senator HRUSKA. We want to thank you for coming before our committee, your honor.

Judge AINSWORTH. Thank you, Senator.

Senator HRUSKA. It is a real privilege to have you here and to comment, as you have, on this important topic.

You are correct, as I know from my own personal experience, that other measures of this kind have been before this committee from time to time. I know that about 6 or 8 years ago there was an effort under the chairmanship of our good colleague Senator Tydings of Maryland, along these same lines; and it is my recollection also that we had hearings, I believe, in San Francisco because the State of California has a disciplinary system for judges, which is quite broad and comprehensive, and they have great power to vote removal. Apparently they either have a constitutional amendment to that effect, or perhaps their constitution does not have the same provisions that our Constitution has.

We went into the matter of functioning of that committee, and we were impressed by the fashion in which it was actually administered; certainly this Senator was impressed. There was adequate restraint, obviously there was a judicious approach to the charges that were made; there were good methods.

However, we always got back to the constitutional provision that judges may not be removed except by impeachment. So, I want to get to the five points that you make, representing suggestions of the Conference.

A second point is that the Conference believes that neither a judge nor a Justice could be removed from office, except by impeachment.

Then you go on to your third point, and I quote "mandatory or involuntary retirement of a judge for physical or mental disability—including habitual intemperance—may be ordered with the judge so charged being relieved of his judicial duties."

Do you, or does the Conference, mean to say by that the relieving of a judge from his duties is not tantamount to removing him from office?

Judge AINSWORTH. Well, it is partially so and partially not. We are trying to follow the Constitution, which the Judicial Conference interprets to mean he may be removed only by impeachment. If he is removed of his judicial duties, he is no longer acting as a judge, but he remains a judge. This is the first time the Conference has ever gone on record as favoring a commission of this kind for the purpose of entertaining complaints against Federal judges.

It is the belief of the Committee, and in turn the Conference, that it would take a constitutional amendment to remove a judge from office; but that less than that, he might be relieved of his judicial duties and still not removed. It is not a play of words, as you can

see, but following the explicit terms, as we understand it, of the Constitution.

I also recognize that there is some difference of opinion about whether the exclusive method of removal is impeachment; but this is what the Conference feels.

Senator HRUSKA. Do you recall, Judge Ainsworth, any exercise of any disciplinary power by the Judicial Conference of any Federal judge?

Judge AINSWORTH. I am not a member of the Judicial Conference but I have attended meetings for the last 6 years, and it has not occurred during that period of time. I'm not aware that there has been. I assume that the Judicial Conference has been looking to the Judicial Council of the circuit courts for taking action in specific cases. I don't know.

Senator HRUSKA. Would you recall such action being contemplated or actually taken in an instance in the State of Oklahoma within the last 10 years? I have a vague recollection. Counsel might recall more specific information on it. Do you recall that situation?

Judge AINSWORTH. Yes, it was the *Chandler* case which went to the Supreme Court of the United States, finally; and Judge Chandler was the district judge in Oklahoma City. The Judicial Council of the 10th Circuit, of which Oklahoma is a part, took some type of action—I don't know whether you would call it disciplinary or not—it relieved him in some way of some of his judicial duties.

Senator HRUSKA. Was he chief judge? He was not chief judge.

Judge AINSWORTH. I think he was. Mr. Westphal is shaking his head. I'm not certain, but I know he was a district judge in Oklahoma City.

Senator HRUSKA. Now, did I understand you to say that it was the Judicial Council that took action?

Judge AINSWORTH. Yes, it took some action.

Senator HRUSKA. And it effected a situation whereby his calendar was either affected, or assignment of cases held back?

Judge AINSWORTH. It did, and the Supreme Court handed down a decision in the Chandler case which sent it back to the 10th Circuit to work out. I don't have the decision in front of me, but I have read it. The decision did not definitely say whether the Judicial Council of a circuit could take disciplinary action against a judge.

Senator HRUSKA. Well, for a long time it has been my idea that under title 28, section 332, which created the Judicial Council, that the broad language of subsection (d) would probably be a good foundation for that type of action.

Judge AINSWORTH. I think you are on sound ground, Senator, a great many share your feelings in this regard, but the Supreme Court has never definitely said this as a fact. The language, as you say, in section 332 is very broad, and I think when situations arise in particular cases, that the Judicial Council of the circuit has a responsibility and authority to take some type of action.

Senator HRUSKA. For the sake of the record, I shall read the exact text of subsection (d):

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The

district judges shall promptly carry into effect all orders of the judicial council.

On different occasions I have taken advantage of opportunities to ask some of your brethren what they thought of that phraseology, and whether or not it was sufficiently broad to cover disciplinary action in the case of either lack of good behavior, or intemperance, or what have you.

The general reaction I got from them—and I kept notes. I may have them in my file on the hearings that were held some years ago—the general reaction I got from them was that they did not consider that specific and sufficiently to the point that they would venture into that field.

Have you had come to your attention this type of attitude on that section?

Judge AINSWORTH. Yes. When I appeared before Senator Tydings when he had hearings on his bill, the very subject came up. We offered an amendment to section 332 at that time, which was more definite in stating what the authority of the council was. It got lost somewhere in the legislative process, it never was passed.

At that time—we are talking about a period of 5 or 6 years ago—some felt that if the councils had more definite authority spelled out in the statute, that might be sufficient. We have moved a long way from that today, and whether or not councils are equipped to do that—they are certainly equipped to handle certain situations, and they do. They even go so far in some cases of relieving a judge of his duties for a while, until he can straighten out a particular situation. That could happen in the case of intemperance, something of that kind.

But, you have put your finger exactly on it. As a judge, I would like to see something more definite. I alluded to the provision you read on page 2 of my statement. If you just put me down as a judge and say, "Decide this question, may you now under section 332 relieve a judge of his official duties," I would say, "I'm in doubt about it."

Senator HRUSKA. If I were a judge, I would hold a cautious attitude on that general language, and I hold no judgment, bad judgment, against the reaction I have received and this committee has received along this line. I would ask the same thing they did, that the Congress speak up more specifically.

Judge AINSWORTH. We offered the opportunity with the amendment. I suppose part of this is attributable to the fact that we haven't had a lot of complaints about judges, it's very rare. Historically that has been true, and very few have been impeached. Some offer the view that the reason for that is that the impeachment process is too cumbersome.

I think another view, however, is that generally the integrity of the judiciary has been very high, and there have not been a great many complaints. There have been some complaints, however, and there is no use trying to sweep that under the rug, there have been. We have heard one here today.

Senator HRUSKA. Yes. Now, the Judicial Conference has acted by rule, hasn't it, by court rule in regard to activities of Federal circuit and district judges' outside activities?

Judge AINSWORTH. Oh, yes, the Judicial Conference.

Senator HRUSKA. And particularly as to serving on the board of directors of corporations, for example, which at one time was considered entirely legitimate and acceptable. But times change, and it was felt that something should be done. And that was accomplished by rule, wasn't it?

Judge AINSWORTH. Yes, and our committee recommended it, our Committee on Court Administration recommended it to the Judicial Conference. A special session was held of the Judicial Conference pertaining to extra judicial income, such as from teaching, lecturing, writing, making speeches where the judge would get a honorarium.

Now, semi-annually, a judge must report all extra judicial income, and, as you point out, he cannot be a member of the board of directors of any corporation, not even a family corporation.

Senator HRUSKA. For profit.

Judge AINSWORTH. That's right. And he may not act as an executor, or administrator of an estate, except in family situations. So, we are very tightly restricted in our extra-judicial activities by a resolution of the Judicial Conference itself. We didn't call it a "rule," we just called it a "resolution."

Senator HRUSKA. It was not a rule?

Judge AINSWORTH. It amounts to a rule, it's a resolution saying, "Do this," and the Federal judiciary responded. Each January 1 and July 1 we fill out a statement telling about all extra-judicial income. Mine always says, "none, none, none," down the line.

Senator HRUSKA. Well, I don't suggest that as an alternative to this bill, but there have been some considerations, some progress made along these lines, in a general way; but they fall short, quite short of the objectives of this bill.

Judge AINSWORTH. The Judicial Council is very keenly aware of the necessity of preserving the highest degree of integrity of the Federal judiciary. And if the Judicial Council of a circuit gets a complaint, it's going to look into it—and the councils do get some. Thus far they have been doing this without a clear definition of what authority they have under section 332. It has been moral persuasion, if nothing else, that has straightened out individual situations.

Senator HRUSKA. Well, thank you again for coming here, and discussing this matter as you have, it will add a great deal to the record.

I take this occasion again to compliment the Chairman for holding these hearings because the subject, although it was considered previously, I think enough change has occured in public consciousness of some of these things, and the necessity, perhaps, for providing for something of this type, that these hearings are warranted and are serving a good purpose.

Thank you, Mr. Chairman.

Senator BURDICK. Judge Ainsworth, the suggestion has been made that Supreme Court Justices be excluded from the bill.

Judge AINSWORTH. Yes, I think that is very definite. It seems to me it is highly inappropriate for a commission of lower Federal judges to pass upon the removal of a Justice of the Supreme Court.

Senator BURDICK. However, the Constitution, when it talks about the judiciary, expressly requires good behavior of the judges, both of the Supreme and inferior courts. It doesn't make a distinction.

Judge AINSWORTH. Well, first of all, I just think it's inappropriate, as I pointed out. The Judicial Conference has nothing to do with the Supreme Court, the statute expressly indicates that.

It seems to me when you get to a level as high as the Supreme Court of the United States, Congress will have to go through the impeachment process.

Senator BURDICK. I'm pointing out, the Constitution makes no distinction.

Judge AINSWORTH. Even though, just as a matter of hard reality, I think that's what should be done; that's what the Conference thinks.

Senator BURDICK. Now, let's look at section 372(b) of title 28, it already authorizes the involuntary retirement of district and circuit judges for physical or mental disability. The statute requires that the majority of the active circuit court judges of the appropriate circuit certify the disability to the President, and if the President finds that in fact a permanent disability exists, a new judge may be appointed, and the disabled judge reduced to lower seniority. Under S. 1110 there would be involuntary retirement also of a Supreme Court Justice.

Now, doesn't 372(d) take care of a lot of these?

Judge AINSWORTH. Yes, it does.

Senator BURDICK. Then, we don't have to plow that ground again.

Judge AINSWORTH. I think it does a very good job. If you have somebody that's sick and can't perform his duties, or who is intemperate, this section does effectively take care of that.

Senator BURDICK. What do you think about adding the words "habitual intemperance" to the statute?

Judge AINSWORTH. If you then retire him and not remove him, I see no objection to it. That's what you are doing, retiring him, under this section.

Senator BURDICK. The Conference also suggests that the bill should be amended so that mandatory retirement, in addition to possible removal, be available as court action to be applied against the judge if it is felt there is serious misconduct.

This sounds to me like retirement with full pay is a reward, rather than punishment for serious misconduct. What further explanation can you give to us of that recommendation?

Judge AINSWORTH. First of all, I don't think there would be very many of these cases. But, assuming there are, you have the choice between that and having a constitutional amendment, which we believe is necessary to remove a judge from office.

I wouldn't like to see a man who just came on the bench, a year later, who because of habitual intemperance couldn't function, get paid for life—I don't know any way around that. You still have the method of impeachment available. That of course would not be unconstitutional, the right of impeachment, if you found someone, say 36 years of age, who is habitually intemperate, you might want to have him impeached. I suggest that method is available.

Senator BURDICK. That would open the door to removal.

Judge AINSWORTH. That would be a removal, removal by impeachment. The committee recommended that procedure to the Judicial

Conference, and the Conference adopted it. I am bound by what the committee did, and what the Conference did especially. So, I don't go one step beyond what the Conference resolved when that was offered.

Senator BURDICK. That means the Conference took the position that only impeachment would do that.

Judge AINSWORTH. That's right. Now, we are supported by eminent authority in that regard, not only the Judicial Conference which in itself is an eminent authority, composed entirely of Federal judges—the cream of the crop, in a sense, judges from all the circuits, district judges elected by the circuits, the Chief Justice presides—it is an eminent body, and this is what they think.

I think there are also a number of writings from professors of law, written in law reviews—though they are not all in agreement—but some of the best say this is the only way to remove a judge.

So, you run into a real problem. The first time you remove a judge, it's likely that he would contest the constitutionality of the Commission's right to remove him from office.

Senator BURDICK. Your second recommendation says that it is the sense of the Conference that the Council on Judicial Tenure should not have the power to recommend removal, nor should the Judicial Conference have power of removal from office. This involves the much debated question whether impeachment is required by the Constitution to remove a Federal judge.

Let me ask you this, do you see any constitutional objection to procedures whereby the Council on Judicial Tenure, and in turn the Judicial Conference would investigate and hold hearings on alleged misconduct of the judge, and if the conclusion is reached that something more than censure is required, to recommend that removal from office would be the appropriate punishment.

Judge AINSWORTH. Well, I think they have the power to do that, but whether they would wish to do it is a matter for them to decide. I see no objection to the procedure you outlined, since I think the Conference has the power to do that. It's a feasible, practical method.

Now, when you do this, recommend impeachment, you go through the regular impeachment process; the House impeaches by resolution, and the Senate tries the individual. In my own mind I question, when you go that far, whether you are going to have very many trials. The judge is going to throw in the towel and resign.

Senator BURDICK. As a practical matter.

Judge AINSWORTH. Yes.

Senator BURDICK. Staff has some questions.

Mr. WESTPHAL. Judge Ainsworth, in your statement you make the point that the judicial system today has no central collecting point as far as collecting complaints about the conduct, or alleged misconduct of a Federal judge.

Do you think that such a central collecting point should be provided for in a bill of this kind?

Judge AINSWORTH. Well, if this bill is passed, you won't need a central collecting point; the collecting point would be the Commission itself.

Mr. WESTPHAL. The reason I ask the question is that the committee has made arrangements, at the request of Senator Nunn, to have one of your colleagues, Judge Griffin Bell appear at one of our subsequent hearings next month. Judge Bell—and I don't want to steal his thunder—Judge Bell, as I understand it, has some feeling on this point because your judicial council has been active in considering complaints about the conduct of the district and circuit judges in your circuit. We have had indications from some of the other judicial councils from some of the other circuits that they have been active in a similar vein. There has been a suggestion made that the judicial council of the circuit should not be cut out of any procedure under S. 1110 when it comes to investigating complaints against sitting judges.

So, let me ask you this, if the judicial council were to be kept in any procedure that evolves from consideration of this legislation, it seems to me that you are then going to have to have a sort of central collection point at which there could be maintained at least a record of the written complaints against a judge.

So, for example, you might provide a procedure whereby the Director of the Administrative Office would be designated as the central collecting point. People who have a complaint they desire to make against a sitting judge could be told by the staff that their complaint should be filed in writing with either the Director of the Administrative Office, or the Chief Judge of the circuit, who is in effect the head of the judicial council. That, if the complaint were filed with the Director, he should refer it to the judicial council; and if the complaint were filed, in the first instance, with the Chief Judge of the circuit, that a copy of that complaint would be registered with the Director of the Administrative Office, so that the Director could fulfill his central collecting function.

So, then the judicial council of the circuit would be the first to investigate the written complaint against the judge, and to report what its findings were of the investigation to the Council on Judicial Tenure. And to provide in the bill that only the Council on Judicial Tenure would have the power to act further on the complaint, including the power to dismiss the complaint, so that the work of the judicial council would remain in the process, and yet, the actual power as far as censure is concerned, or involuntary retirement, would have to be first considered in the Council on Judicial Tenure, holding a formal hearing; and then ultimate action by the Judicial Conference.

Now, assuming a proposal drafted somewhere along that line, do you think that would be a feasible way of keeping the Judicial Council in the action, so to speak, and also providing a central collecting point?

Judge AINSWORTH. Well, I want to be a little guarded in answering your question because I am answering in a representative capacity.

Mr. WESTPHAL. I'm asking the question of you as an individual.

Judge AINSWORTH. It might be something that the Committee on Court Administration would have to consider, and the Judicial Conference. Asking me as an individual, you are just putting another

first step before you get to the council, in letting the judicial council of the circuit straighten out the situation before it reaches the Commission. If I understand you correctly, I can't see any reason why that can't be done.

But what the mechanics of it are, whether the Administrative Office here can handle it, what confidentiality would attach to it, and so forth are questions we would have to think about.

If you were to ask me right now, do I see any reason why it can't be done, no. My committee might later on find a reason why it should not be done, and the Judicial Conference might, too. But, I am willing to say for myself, I see no reason why it could not be done.

Mr. WESTPHAL. When is the Committee next scheduled to meet?

Judge AINSWORTH. We won't meet until July. That's fairly soon.

Mr. WESTPHAL. It has been suggested to us in private conversation with some of the witnesses that the absence of good behavior, or the presence of bad behavior, may include neglect of duty, or, as California law calls it, "Willful and persistent failure to perform the duties of office."

If that type of conduct on the part of a judge is to be looked into, it seems to me that the judicial council of that circuit may be, in fact, the best judge of that, or the best qualified to make a preliminary investigation on whether there is any substance to such an allegation, and that therefore there would be some advantage in keeping the judicial council of the circuit in the process; that they have a better capacity to judge and evaluate a complaint of that kind than the Council on Judicial Tenure.

Judge AINSWORTH. Well, you make a good point, and you stated the reason the judicial council's membership is composed of judges who will know the individual involved, and have a closer knowledge of the situation. I think you make a valid point, there is a place for the council, and perhaps it should not be excluded from the process.

I haven't heard this approach before, and I do not know how the sponsors of the bill would react to it. Before I would definitely commit myself, I would want to study it further. However, it looks practical.

Mr. WESTPHAL. Well, I mentioned it to the chairman and Senator Hruska, and I invite you to give it full consideration because I think it would be a modification of the bill which may have some advantages to it.

Judge AINSWORTH. I would request counsel for the subcommittee to write me more specifically, and I will take it up with the committee.

Mr. WESTPHAL. All right. Another point along that same line. The bill makes reference to habitual intemperance. In your testimony you suggested that the judicial council in the Fifth Circuit, on occasion, has had to consider habitual intemperance which was alleged against a judge.

Now, it seems to me, again, on conduct of that type, which might be the basis for a complaint against a sitting judge, that if the judicial council of the circuit were to look at that in the first instance, the judge against which such charge is made would in the

first instance have to deal with his peers. Maybe if you have a situation which is retrievable and correctable, the correction could be induced more by the man's peers sitting on the judicial council of the circuit than it could be by the Council on Judicial Tenure, as proposed under this bill.

Do you have any comments on that?

Judge AINSWORTH. I agree fully with what you say.

Mr. WESTPHAL. So, if for those reasons and others there was felt to be a need to retain the judicial council in the procedure; and then, in order to guard against—let me put it bluntly—a possible whitewash by one's peers, the procedure were to involve this concept whereby after the original investigation by the judicial council, the judicial council would report its findings of the investigation, and possibly recommend appropriate action to the Council on Judicial Tenure. So, if the complaint is groundless, if there is an explanation that would justify the dismissal of the complaint, rather than leaving the complaint hanging vaguely over the head of the judge with no action against him, that dismissal would be made by the Council on Judicial Tenure, rather than by the man's peers. Would you agree with that?

Judge AINSWORTH. I see no reason why it couldn't be done either way. Your suggestion may provide a better way.

Mr. WESTPHAL. Your statement makes reference to the efforts in 1966, asking the Federal judiciary, at that time, for their reaction to some "alternative proposals to the Commission on Judicial Disability," and then you describe briefly some of the plans that it considered at that time. Was there any followup on that survey?

Judge AINSWORTH. I was not a member.

Mr. WESTPHAL. Could you give a summary to the subcommittee what the thoughts and perception of the judiciary were at that time?

Judge AINSWORTH. I was not a member of the committee at that time, so, I don't have personal knowledge; I do have hearsay information. We are speaking of a period of 8 to 10 years ago when the question was circulated, there was not very much response from the Federal judiciary, there didn't seem to be very much interest, or not enough interest, to warrant going forward with this type of bill.

Mr. WESTPHAL. You had a dialog with Senator Hruska about the power of the judicial council under section 332, and this is somewhat related to the subject we were just talking about, the power of the judicial council in this *Chandler* proceeding. I have an advantage over the Senator, I have a copy of the decision in front of me—in the footnote to the decision in 398 U.S. at p. 85 there is the statement:

> Congress by its use of the mandatory "shall" in Section 332 appears to have intended that district judges carry out administrative directives of the judicial council. Congress did not spell out procedures for giving coercive effect to council orders, and the legislative history sheds no light on whether Congress intended that statute to be implemented by regulations. Standing alone Section 332 is not a model of clarity in terms of the scope of the judicial council's powers or the procedures to give effect to the final sentence of Section 332. Legislative clarification of enforcement provisions of this statute and definition of review of council orders are called for.

The Supreme Court went generally along the lines of the dialog which you and Senator Hruska had.

Judge AINSWORTH. That's what he said.

Mr. WESTPHAL. So, as envisioned by the Supreme Court in the *Chandler* case, and as would be required under the proposal you and I have just discussed, obviously some strengthening of the statutory language as far as the role the judicial council is to play in this problem of supervising sitting judges in a particular court would seem to be in order.

Judge AINSWORTH. This is a big subject and requires a lot of thinking as to what power should be given the council, and whether it refers to administrative procedure, or whether it refers to relieving the judge of his duties. And, there also has to be considered, in light of the bill pending here, whether or not it is enacted.

Mr. WESTPHAL. One other point that was discussed related to the power of the Judicial Conference under existing statute. Reference was made by you to the fact that by resolution the Judicial Conference requires semiannual reports disclosing the source of outside income from Federal judges.

Again, the existing statutes, as they do in the case of judicial council, do not have anything in them expressly authorizing such a resolution, or authorizing coercive measures in failing to comply with such resolutions adopted by the Judicial Conference.

The reason I make that statement, it is my understanding that a number of Federal Judges have taken the position, as a matter of principle, that they will not report any such income because they don't believe the statute creating the Judicial Conference gave to the Conference any power to adopt such resolution, or to enforce it. Is that a fair statement of that situation?

Judge AINSWORTH. Yes, that is correct.

Mr. WESTPHAL. So, again that points up the fact that under existing statute neither the judicial council nor the Judicial Conference have, spelled out in the statute which creates them, a definite power to act in cases of bad behavior. Would you agree with that?

Judge AINSWORTH. Yes. In cases of someone failing to file the semiannual financial report—that is another illustration—what can you do to him for failing to file? The reason nothing has been done, is that the statute is vague.

Mr. WESTPHAL. Well, then, assuming that the subcommittee decides in the first instance the constitutional questions that are raised by this bill, do you agree that there is a need for some legislation within the limits of constitutional constraints, to provide a system by which complaints concerning the bad behavior, alleged bad behavior of a judge could be investigated and some appropriate action taken?

Judge AINSWORTH. I think so, that is why we endorsed this bill in principle. We have not endorsed specific provisions for reasons you can see. But, yes, that is why we endorsed the bill.

Mr. WESTPHAL. Thank you, Judge Ainsworth. Mr. Chairman, I have no further questions.

Senator BURDICK. Are there any further questions?

Senator HRUSKA. One more, Mr. Chairman.

In the event of mandatory retirements—that may not be the phrase.

Judge AINSWORTH. Well, that sometimes is the phrase.

Senator HRUSKA. In the event of mandatory or involuntary retirement of a judge, if that were declared, would the judge still be entitled to office quarters, clerical help, and other substantial attributes of office?

Judge AINSWORTH. I can't be too specific, but I think not. If he is not performing any duties, I don't think they provide him with an office. Even now, if a person has senior status without any more than his right to do so, he is not kept in an office unless he works some substantial period of time. The Administrative Office has some type of informal rule of thumb they use.

So, if a judge has retired—involuntarily, or mandatorily—my view is he would not have quarters.

Senator HRUSKA. And if a judge resigned, he would no longer be entitled to quarters.

Judge AINSWORTH. If he is no assigned duties as a judge, he would not be entitled to an office.

Senator HRUSKA. The assignment of cases, is it not under the control of the Chief Judge?

Judge AINSWORTH. Of the Chief Judge of the court, I would say.

Senator HRUSKA. So, if someone applied to him personally for an injunction——

Judge AINSWORTH. He couldn't act, as I understand it. I don't believe he could act if he has been involuntarily retired and relieved of his judicial duties.

Senator HRUSKA. He would still be in office.

Judge AINSWORTH. He would still get his pay, that's about it. He is still paid, but he has no other functions.

Senator HRUSKA. What bearing has this on a situation as provided for in point 3? If it is conceded that a judge cannot be removed from office except upon impeachment, there is nothing to prevent the Congress from abolishing that particular court? There was such an instance in the early "teens," as I remember. It was the Commerce Court, or something of that kind. Judges were appointed and did function, and then the court was abolished.

Judge AINSWORTH. You present a very serious constitutional question. I couldn't answer it. You wouldn't want to abolish the court because you have other members of the court. There are very few single-member courts, though there are some.

Senator HRUSKA. Well, what I had in mind was, if that happened, if that could be done, then the lesser could also be done, namely, the judge could be relieved of his duties and not be deprived of his office.

Judge AINSWORTH. I would be afraid to answer your question directly because it may have constitutional implications, such as reducing the salary of somebody in office, during his tenure in office,

things of that kind, which have constitutional implications. It is certainly worthy of exploration, but I hesitate to say that you could do it.

Senator HRUSKA. Thank you very much.

Senator BURDICK. I have just been advised that in the Commerce Court situation the judges were assigned to other courts.

Judge AINSWORTH. That's good.

Senator HRUSKA. Off the record.

[Discussion off the record.]

Senator BURDICK. Well, thank you very much, Judge.

[Whereupon, at 11:20 a.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, February 26, 1976.]

JUDICIAL TENURE ACT

THURSDAY, FEBRUARY 26, 1976

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick, chairman, presiding.

Present: Senators Burdick, Hruska, and Scott of Virginia.

Also present: William P. Westphal, chief counsel and Kathryn M. Coulter, chief clerk.

Senator BURDICK. The subcommittee will come to order.

Today is the third day of hearings on S. 1110, a bill to provide a method of censure and removal of Federal judges as an alternative to the impeachment proceedings provided in the Constitution. In our prior hearings this subcommittee, as well as witnesses which we have heard, have taken note of the fact that consideration of this bill necessarily involves a much debated question of whether impeachment under our Constitution is the exclusive method for removal of Federal judges, or whether the "good behavior" clause of article III may be implemented by the Congress in order to provide a method for removal of a judge who is guilty of bad behavior.

To assist us in our consideration of this constitutional question. we are privileged to have with us today Prof. Raoul Berger, from Harvard Law School, who is an eminent authority, if not "the" eminent authority, on the impeachment clause of the U.S. Constitution. In 1973 Professor Berger published his definitive work entitled "Impeachment: The Constitutional Problems".

It is a pleasure to welcome you today to our subcommittee, Professor Berger, and we are appreciative of the assistance which you can offer us on this subject.

STATEMENT OF PROF. RAOUL BERGER, HARVARD LAW SCHOOL

Mr. BERGER. I am delighted to appear before you, Mr. Chairman, and members of the committee because I think you are dealing with a highly worthwhile task; you can disencumber the Congress of a very burdensome and really not indispensable procedure. It is costly in terms of your time and energy to take weeks and weeks off to get rid of a dirty little crook in the judiciary.

The house cleaning ought to be turned over by you to the judiciary, saying, "You do it, if you don't do it, we will."

Now, one of the pleasures of appearing before you is, I know I'm talking to lawyers. We are accustomed to thinking as lawyers, and you will bear with me if I share with you some of the learning that I accumulated studying this problem. I think it is important to have a number of doctrinal distinctions in mind, because I learned just the other day of the dangers of just muddling along, when a Member of the House sent a bill to me which is going along the same direction, but which rests on the impeachment powers.

Now, the impeachment power is a very narrowly circumscribed power to be exercised only in the manner laid out in the Constitution, it can't be sub-delegated. So, we need to appreciate that we are dealing with two utterly different things.

I have a short statement, and I want to read it to you because I think it will be useful.

Senator BURDICK. Very fine.

Mr. BERGER. I always try to use my opportunity of oral argument because then I get two cracks at it. One, you may read my statement, two you will hear it.

Let me say to you right at the outset, impeachment is a legislative trial, strictly circumscribed. Good behavior is a judicial forfeiture proceeding, it has nothing to do with impeachment; and it is a mistake to intermix the two. Breach of good behavior could result in trial in a court. There is not a single case of impeachment for breach of good behavior in the history of England. Now, with that, let me proceed to my statement.

In 1970, I studied the problem of removal of judges by judges in depth and published the results in the Yale Law Journal. It was that study that excited my interest in the questions presented by impeachment.

You are to be congratulated for taking up a problem that had perennially troubled the Congress. Hatton Summers, veteran chairman of the House Judiciary Committee, who participated in two impeachments, commented some 40 years ago that the House was reluctant to take the time of the Senate to try a "crooked judge" because it would distract the Senate from "all the other great business of a great Nation and make them sit there for days and days."

Back in 1936, Senator William McAdoo stated after the impeachment of Judge Halsted Ritter that the difficulties of impeachment made it a "practical certainty that in a large majority of cases misconduct will never be visited with impeachment, a standing invitation for judges to abuse their authority with impunity."

Few students would disagree. The procedure formulated in the Nunn bill would relieve Congress of this burden; it would not encroach on the powers of the judiciary but would assist it in performing its own housecleaning.

At the outset we need to clarify a number of doctrinal matters and to disabuse ourselves of the notion, voiced by no less a personage than then Congressman Gerald Ford, that the impeachment process can be employed to remove an officer for breach of "good behavior." Impeachment and removal for breach of "good behavior" have altogether different roots; both are common law terms

which had an established meaning. It has often been held that when the Framers employed common law terms like habeas corpus, bribery, they adopted the British meaning and practices associated therewith.

At common law enforcement was a criminal proceeding brought by the House of Commons before the House of Lords on charges of "treason, bribery, or other high crimes and misdemeanors" which could result in removal from office and very severe penalties. Impeachment must be regarded as a breach in the separation of powers; it enables the Senate by a two-thirds vote after a formal trial to remove an offending officer. The sole power of Congress to remove an offending officer. The sole power of Congress to remove a civil officer, it needs to be emphasized, is by impeachment for "treason, bribery, and other high crimes and misdemeanors."

This is underscored by the denial of the power to remove on an address of both Houses to the President, a power exercised by Parliament and the king, embodied in a number of State constitutions, but deliberately withheld by the Federal Constitution. Although the Framers departed from the English model in separating the removal proceeding from a criminal proceeding, they intentionally retained the limited, technical meaning of "high crimes and misdemeanors" at common law, and although removal for "maladministration" was made a ground for impeachment by some State constitutions, that ground was rejected by the Framers.

Now, I want to deal with that for a moment, there was a broad term, "maladministration" not quite as broad as "good behavior," a term that was embodied in four- or five-State constitutions, and it was pressed on the Congress, and yet rejected because it was too broad and would leave the President, as George Mason said, "At the mercy of Congress." So, how can we read "good behavior," a still broader term into "high crimes and misdemeanors", when "maladministration" was rejected, and a narrower, limited technical term was substituted.

Now I go back to my statement.

Consequently, I would differ from Congressman Gerald Ford's view that "high crimes and misdemeanors" means whatever the House and Senate choose them to mean. That view was not followed. I rejoice to say, by the House Judiciary Committee in the impeachment investigation of President Richard Nixon. It would have been a sorry spectacle to throw him to the wolves. I have stressed these facts to underline that impeachment for "high crimes and misdemeanors" has a limited compass which does not comprehend all misbehavior.

In contrast to impeachment, removal for breach of good behavior was not a legislative, but a judicial proceeding. Good behavior tenure, to use familiar legal terms, was an estate on condition subsequent which for forfeited on nonperformance of the condition. It was terminated by a breach of good behavior, and the termination was declared in a civil proceeding for forfeiture of the office. Its sole object was to remove the misbehaving officer; there were no penalties, no disqualification to hold office in the future. The Framers patterned the good behavior tenure of judges on the then English practice; it was proposed in the Convention at the very outset and

was embodied in article III, section 1, the Judiciary Article. The provision for impeachment, on the other hand, was placed in the Executive Article, article II, section 4, for the simple reason that virtually all of the discussion and impeachment was centered on the President. Only at the last minute were the words "all civil officers" added, without any discussion whatever of the removal of judges of the inferior courts. One commentator has suggested, therefore, that there may be some question whether the Executive Article was intended to apply to them.

Good behavior had its own criteria which may roughly be stated as the faithful and diligent conduct of an office: it might be breached by abuse of office, neglect of duty, nonattendance and the like. You may ask, does not neglect of duty likewise constitute an impeachable offense? But the nonattendance instanced by Coke as a breach of good behavior is far removed from impeachable neglect such as that of an admiral to safeguard the seas or of a Commissioner of the Navy adequately to prepare against a Dutch invasion. High crimes and misdemeanors and breach of good behavior are like two interesting circles; there is an enclave where they are coterminous. But while all high crimes and misdemeanors might constitute a breach of good behavior, not all breaches of good behavior amount to high crimes and misdemeanors, as is underscored by the Framers' rejection of maladministration as a ground for impeachment. Congress therefore might be content to leave removal of judges to the judiciary and keep its own impeachment power in reserve in the event that the judiciary failed to remove a serious offender.

Supposing that a Supreme Court Justice was caught with his hand in the till and the judiciary did nothing about it, it would be up to the Congress to say, "This is a very serious impeachable offense, we want to remove this man from the Supreme Court"; that is your prerogative, you can exercise it. There is nothing in the Nunn bill that would prevent you from doing so. In fact, it's advantageous to rid yourself of housecleaning and use impeachment as a sword when needed.

This was precisely the role envisioned by the First Congress when it recognized the President's power to remove subordinates and stated that if he failed to remove a derelict officer, Congress had the supplementary power to do so. That's emphasized, that it is a supplementary power, for article II, section 4 does not make impeachment mandatory; it leaves it in the discretion of Congress. See article I sections 2(5) and 3(6).

When an office held "during good behavior" is terminated by the officer's misbehavior, there must be an "incident" power "to carry the law into execution," Lord Mansfield held years ago, if "good behavior" is not to be an impotent formula.

Let me restate that off the cuff. "Good behavior" tenure is automatically terminated on misbehavior, that is the historic concept of the word "good behavior." The tenure is for so long as you do not misconduct yourself in office. Now, if a man misconducts himself in office and doesn't leave it when asked to do so, it would be an impotent formula without some means of implementation such as the

common law forfeiture procedure. That is what we are talking about here.

English law provided a proceeding to forfeit the office by a writ of scire facias. Because almost all judicial appointments prior to the Act of Settlement in 1700 were held at the pleasure of the King, there were no cases of removal of judges by scire facias. But the remedy was known, and in two cases prominent judges, Sir John Walter and John Archer, who had been given "good behavior" tenures, resisted removal by the king except after a trial on scire facias. So, here were two judges who said, "Before we can be ousted we demand a trial on scire facias."

Chief Justice Holt, Lord Chancellor Erskine, and Sir Walter Holdworth recognized the applicability of scire facias to removal of a judge. And, if we don't have exactly such a proceeding today, there is nothing to prevent Congress from fashioning a remedy appropriate to the needs of the case. If an end is clearly delineated, I think it was Madison who said, "The means are under the necessary and proper clause, available to you." You can implement the termination on misbehavior by what you are doing here in the Nunn bill.

It's captious ribbon matching to demand a precise case of forfeiture of judicial office when scire facias was available for forfeiture of office held "during good behavior." The law proceeds by analogy: if scire facias lies for removal of an officer, it may also be employed for removal of a judge. At worst, no more is involved than the extension of a known remedy to judges in order to effectuate the framers' design that judicial tenure terminate on misbehavior. When they employed the terms "during good behavior" they knew that the tenure terminated on misbehavior and was subject to forfeiture. All that is required is to spell out the mechanics for the forfeiture. Observe that I do not rely on the congressional power of impeachment, which is limited, but on the "necessary and proper" clause to provide a remedy for effectuation of the framers' intention.

Congress may fashion and has fashioned new remedies, if scire facias for judges may be regarded as new. Enabling legislation may be regarded as an additional grant to the courts of subject matter jurisdiction—forfeitures of judicial office, if it be assumed that the existing forfeiture jurisdiction is inadequate. If the court has jurisdiction to forfeit an office, which unquestionably it has, it has jurisdiction to forfeit a judicial office. You can cure any doubts by making it clear as you do in the Nunn bill.

May I remind you that the existence of an exact precedent is not the test of "judicial power"; all that is required is a "case or controversy" and that is satisfied when a charge of misbehavior has been made and controverted. Mark, too, that all that is sought by the Nunn bill is to supplement existing "judicial power" as Congress has so often done in the past.

Now I turn to various constitutional arguments against the line of reasoning I outlined for you here.

The arguments against removal by the judiciary are three: One: Impeachment was made the exclusive removal process; two: Judges were given absolute independence; and three: "Good behavior" tenure affords judges special insulation.

One: By article I, section 2, the House is given "the sole power of impeachment," and by article I, section 3, the Senate is granted "the sole power to try all impeachments."

Back in 1936 a district judge, Merrill Otis, performed mighty labors to prove that "sole" means "sole"; who would controvert that? But, sole power to do what? Sure you've got the sole power, but sole power only to impeach, nothing else; that's one method of removal, and it's the sole method that has been granted to you. This means that no other body can bring or try impeachments; it does not purport to bar other methods or removal by the other branches. It is argued, however under the maxim expressio unius exclusio alterius that the provision for impeachment bars all other methods of removal.

Now, that is an argument that has been regarded as conclusive by a dear friend of mine, an honored friend of mine, Senator Ervin. As one who worked for 40 years—and remember, long before I turned to Academe, I was a practicing lawyer right here in the Washington jungle, and I know something about the uses of legislative history. I have appeared in the courts, and I understand what its uses and misuses are.

Now, expressio unius exclusio alterius is a fine interpretative tool when other light is lacking; it is employed when other evidence is lacking to ascertain the intention, not to thwart it once you have discovered what the intention is.

Let me give you several ideas against application of exclusio unius to this situation. First, the maxim would in part nullify the provision limiting tenure to "during good behavior," for as I have indicated, impeachment for "high crimes and misdemeanors" reaches only the more serious forms of misbehavior. A judge might be guilty of lesser wrongs of misbehavior, for example, he might be utterly unfit for office by exaggerated intemperance. I once knew a district judge who was so drunk all the time he couldn't sit on the bench. Now, that's not a high crime or misdemeanor, but it's indefensible to say such a judge must remain in office. Misbehavior, under "good behavior" would reach cases like that, impeachment ought not. So "exclusivity" would to some extent, therefore, abort the provisions for tenure only on "good behavior." That is one reason for saying that expressio unius is not applicable here.

Bear in mind, forfeiture of office for misbehavior was an incident of the tenure, and Hamilton refused to regard the maxim as conclusive where it would curtail an existing power. This was in connection with the provision for juries in the trial of criminal cases, and it was argued in the several State conventions that by explicitly providing jury trials for criminal cases, jury trials were barred in civil cases. And remember, the jury trial was very dear to the hearts of the framers.

So, Marshall said in the Virginia Convention:

> Why, no, it doesn't have that effect at all. It has always been an established tradition that there is a jury trial in civil cases, and nothing in the provision for criminal trial is intended to curtail that.

And by the same token, if you had forfeiture for "good behavior" as a long tradition, using Hamilton's and Madison's argument, nothing in the provision for impeachment aborts that.

Second, the First Congress, immediately on the heels of the Federal Convention—and remember the First Congress was like an adjourned Federal Convention, it had many framers and ratifiers—the First Congress recognized that the President had an independent power to remove "civil officers" in the executive branch, testimony that it did not deem the impeachment provision to be exclusive.

Look at it in terms of commonsense. Today we have 2½ million employees. Every time a crooked man is in the executive branch, a subordinate, do we have to have an impeachment process? Well, 175 years ago the First Congress said the provision for impeachment had no such silly consequence in mind. And so, we have an exception for removal by the President of members of the executive branch. And I say, by the same reasoning, there is an exception for the removal, by judges, of judges, in the judiciary branch.

Third, Hamilton himself made an exception for insanity, for which "no formal or express provision was made." This exception shows again, given a necessary result, he didn't regard impeachment as exclusive, as indeed it shouldn't be. We cannot attribute to the framers intention to insulate insanity; it is just unthinkable that the framers contemplated that if you can't impeach an insane judge, he is going to stay in office forever. That is an utterly ridiculous conclusion, and that rebuts exclusio unius again.

Fourth, the act of 1790, enacted by the First Congress—which is itself a construction of the highest consequence—provided for disqualification from office after a criminal trial and conviction of a judge for bribery. Since the impeachment provision contains an express disqualification phrase, this again testifies that the First Congress, the preeminent interpreter of the Constitution, did not deem the impeachment provisions to be exclusive. In the words of Chief Justice Marshall, the implication of expressio unius may serve where it "promotes, not where it defeats the intention." It needs more than a maxim to overthrow the intention to terminate judicial tenure on breach of "good behavior."

I hope you understood the 1790 act argument, disqualification from office is to be found only in the impeachment clauses. So, one can argue expressio unius, you can only disqualify when you do it in impeachment. But the First Congress, which knew the Constitution better than any subsequent Congress, the First Congress enacts a statute that says that after a conviction for bribery a judge is disqualified, which is a constitutional interpretation that the impeachment clause is not exclusive.

Have I made myself clear on that score, gentlemen?

Now, let me go to a second argument, first advanced by Justices Black and Douglas, that judges enjoy "absolute" independence. Constitutional history affords no warrant for the claim. "The independence of each power," said James Wilson, "consists in this"; it "should be free from the remotest influence of each of the other two powers. But, further than this, the independency of each power ought not to extend."

In other words, the judiciary was to be free from encroachment by the legislative and executive branches. Let me give you an illustration close to home. The "Speech and Debate Clause" disables the judiciary, it disables the Executive from holding a Member of

Congress responsible for what he said in the Congress. Does it disable the Congress itself from disciplining a member? You have censures of Members of Congress in the precedents.

So, by the same token, the independence of judges is secure against encroachment by the legislative and executive, but just as the "Speech and Debate Clause" doesn't prevent the Congress from policing and disciplining its own members; so to me "independence" of the judiciary does prevent the judiciary from disciplining its own members.

Judges of inferior courts had been subject to attachment by King's Bench for misconduct and oppression, and there is no evidence that this attribute of judicial power was to be curtailed. The law, as Chief Justice Burger reiterated, is that, given an established common law practice, there must be a clear intention to curtail it before even the clearest language will be interpreted to cut down that established common law practice.

Moreover, Jefferson wrote in 1816 that judges were removable "by their own body." The very fact that judicial tenure was conditioned on good behavior itself indicates that it was not to be "absolute," that is, unlimited. To my mind the Black-Douglas repugnance to judicial removal is passing strange. The recent Nixon proceedings once more demonstrated how hard it is to banish partisanship from impeachment proceedings. Political passions are far more likely to animate Congress than a court. With all due respect, I would rather be tried by men trained to sit in judgment, by a court rather than by Congress. Are we to entrust to a court the trial of a man's life and lose confidence when it is a judge's right to remain in office that is to be tried?

In other words, if we can trust a court to try a man for his life, we can trust him to try another man merely to decide whether he is to remain in office, whether he has misconducted himself; that is a much, much less serious situation.

Three: It is also argued that the "during good behavior" phrase affords judges special protection except by impeachment. As we have seen, that provision antedated the impeachment provision, which revolved almost entirely around the President. While "good behavior" was designed to protect judicial tenure, that tenure was expressly conditioned on "good behavior." Namely, it wasn't absolute, it was only so long as the man behaved himself.

In employing the term the framers were aware that the tenure was terminated by breach of "good behavior." They exhibited no intention of continuing a misbehaving judge in office. To insulate him from misbehavior would in part abort the "good behavior" provision. There is no evidence that the framers meant to insulate a misbehaving judge from removal if he was not reachable by impeachment. A canon of construction requires that if possible every portion of the Constitution must be given effect. To confine removal to impeachment is to deny effect to the words "during good behavior," for it did not require those words to authorize removal for "high crimes and misdemeanors," to which impeachment alone extends. "Good behavior," I submit, must be regarded not only as a shield for the protection of a judge, but as a sword in the hands of his fellow judges if he violates its demands.

The very words "good behavior" show that it was not meant unconditionally to insulate judges; he was to have his office only so long as he did not breach the requirements of good behavior, no longer. And let me remind you that impeachment has nothing whatsoever to do with that, that was a question for courts to decide.

A word about the criteria of good behavior employed in section 372(b) of the bill. Removal for mental or physical disability seems to me well within the requirement of common law. An officer who is disabled physically or mentally cannot diligently conduct his office. Hamilton, you recall, stated that insanity was an essential ground of disqualification, and to my mind senility or physical incapacity stand on the same ground.

To put it another way, a man who is in a straight-jacket, for example, obviously can't conduct the office at all. So, obviously, he fails to meet the requirements of diligent conduct of his office; and that's true of a man that has been paralized by a stroke, or is too senile to understand what you are telling him. Habitual intemperance likewise interferes with the diligent conduct of an office, and in my opinion it also constitutes a breach of "good behavior.

The very first Federal impeachment, that of Judge Pickering, was for insanity and habitual drunkenness; removal for misbehavior is more readily justified—it doesn't proceed on intent against a man who is incapable of harboring an intent. Pickering's impeachment was a partisan proceeding. Let me remind you, that when Jefferson seceded, Adams blanketed virtually the whole Federal Bench with Federalist judges; they attacked Republicans in very intemperate fashion. So all the partisan feelings of the Republicans were excited, and they took out after a number of Federal judges, including Justice Samuel Chase.

But personally I would say, if you can impeach a man for insanity, then certainly you can remove him from office on the grounds that he is incapable of diligently conducting his office, which is the essence of misbehavior.

The caution with which you—I should say Senator Nunn—have approached the definition of lapses from good behavior is commendable. As the common law term embodied in the Constitution, good behavior is jurisdictional; just like the jurisdiction of the Congress is bounded by the meaning of high crimes and misdemeanors. The bill can't go beyond that. In the same way, the power to remove is for such misbehavior as was regarded as a ground at common law. To profit from experience, I would suggest adding removal for corrupt or criminal conduct in office and for abuse of judicial power. And I want to emphasize that over the years hundreds of complaints have been filed, and I would venture to say that a good 95 percent of them dealt with crooked judges.

So, I would suggest to the committee that this bill ought to be amended to include what has really been the crying need—the trial of Halsted Ritter was based largely on alleged criminal offenses—and I would urge you to cover a judge who abuses the power of his office, or is guilty of criminal misconduct in office, embezzlement, bribery and corruption—that ought to be covered in this bill. I think that is more important than senility; how many cases of senility have

we had in 170 years? You have had hundreds of charges of crookedness.

It may be that there are also other grounds, for example, demonstrated incompetence, or ignorance, which I treated in my book. Experience may suggest that such cases should later be added.

In sum, it is open to Congress, and I consider it highly desirable, to enact legislation under its necessary and proper power which would give effect to the common law attributes of good behavior and confirm and facilitate judicial removal of judges for misbehavior. At worst, the constitutionality of removal by judges may be open to question, but the last word of such doubts is for the Supreme Court. I would remind you of what Jefferson stated: "It is not for those who are only to act in a preliminary forum to let their own doubts preclude the judgment of the court of ultimate decision."

In a word, it's not enough that you have doubts. And, by the way, I was very encouraged that Senator Hruska was kind enough to tell me he spent 2 hours of his precious time before bedtime reading two chapters of my book. I think that's terrific. That is more homework that many a judge has done before one of my arguments in the court of appeals. So, I'm grateful to you for that.

In my analysis I have tried to face up manfully to every argument of the opposition. Nothing that I have seen convinced me that I am wrong—and I'm always ready to confess when I made an error, we are all fallible. I am convinced that there is no merit in the constitutional arguments, Mr. Chairman, and if there were more merit than I accord to them, I think it is important for you to disencumber yourselves of this perennial problem which, bear in mind, suggests to the judges that they are immune. We had one case of Albert Johnson that I treated, where charges were leveled for 20 years, and you couldn't get rid of him. He sat there, and he was constantly in trouble up to his ears in alleged crimes.

So, I say to you, if you have constitutional doubts, do what Jefferson did. There is enough behind the argument for removal by judges to let it go in form of legislation which can be challenged. The Supreme Court will decide the question; we will get the decision in the ultimate tribunal.

Now, if you will afford me a few more minutes, I want to call your attention to a number of things on the face of the bill that rather trouble me. You know, there is such a thing as suffocating the baby in too much due process. I'm a great believer in due process. I fought with the administration as an administrative lawyer. My colleagues thought I learned something about administrative law because they made me chairman of the Section of Administrative Law of the American Bar Associaion. I know what due process means, and I have always fought for it. But, you can't fetter yourself so you can't move.

The bill provides for two hearings. The minute you use the word "hearing" you suggest all of the paraphernalia of a hearing, and courts are very prone to say due process is required. Hence, the first hearing ought to be revised so that it's plainly just a grand jury investigation. I would reword that so that all that is required by the

Council is a thorough investigation, and the judge is getting something that every accused would love to have, every criminal—he is getting an investigation by judges, the most competent investigators.

Let that be just an investigation, and after the investigation, let the council prefer charges. I would remove every vestige of a suggestion that the "hearing" by the Council is "a hearing". Why should a man have two judicial hearings, particularly when he is going to get a review by the Supreme Court at the end of it? You make one record, and that's enough.

Then, there is at least one section that's open to the reading that after the Supreme Court review a judge will still have another hearing—let me see if I can put my hand on the precise section.

It suggests that after he has been retired under the due process here under 372(b) by the Conference, that he can still come around and request a further hearing on whether he should get assignments or not. I would cut that out altogether.

After he's had his hearing, he's had an investigation; he had had due process in the form of a full-dress hearing before the Conference, review by the Supreme Court—finish, that's the end of it.

If the Conference wants to use him and assign cases, that's a matter of grace. He has been retired from the bench, he has had all his rights adjudicated, he is no longer entitled to anything. To have still a fourth hearing, it seems to me, is really stretching it much too far —and I hope Senator Nunn will forgive me—it's ridiculous.

And now, gentlemen, fire away; and to the extent I'm able I will try my best to answer your questions.

Senator BURDICK. Senator Hruska, do you want to question first?

Senator HRUSKA. Professor Berger, I note the parallel between your two chapters in your book on "good behavior" and the content and thrust of your statement this morning, and it is certainly a lucid and concise treatment of the substance of those two chapters. Am I correct?

Mr. BERGER. That is right, sir.

Senator HRUSKA. The thread of the two chapters was well carried forward in your statement. I was particularly grateful to you, in your book and in your statement, for the differentiation in such a lucid fashion, between an impeachment, and then the implied powers which are in the use of the term "good behavior".

It is a well-known principle of constitutional interpretation, is it not—and John Marshall was the first to enunciate that—that where there is a responsibility for duty enjoined upon any of the branches by the Constitution, there is an implied power to use those incidents, those resources at their command to implement that power and make it meaningful. Is that correct?

Mr. BERGER. That is correct.

Senator HRUSKA. And it is upon that that you base, principally, aside from precedent—which I will get to a little later—it is upon that factor of implied power that your proceed to the conclusions you have reached?

Mr. BERGER. That is right, sir. Plus the "necessary and proper" clause, Senator, remember, in addition to what you are saying, there

is that expressed power to supplement all the powers vested by the Constitution in any branch; and Congress has always done that. With respect to the First Congress, you recall, it had this long Judiciary Act of 1879, which fleshed out article III.

And what you are doing is supplementing the judicial power.

Senator HRUSKA. Now, in the case of impeachment we have the intrusion of one independent and coequal branch of the Government under the Constitution onto another coequal branch. Is that one reason, in your judgment, for the framing Fathers to have given express assignment of the sole power of impeachment to the Congress?

Mr. BERGER. That's precisely it, if you will permit me to embroider that just a little. That is one of the things we are apt to forget. The equilibrium of the three branches was looked at quite differently to the framers than it appears to us today. They distrusted the Executive had always been a creature of the Crown, governors they had been saddled with. So, when they remembered all the excesses of the Crown; when they remembered that people that were put in executive posts were apt to become Ceasars—to use their own words—they left it to the Congress to curb the excesses of the Executive within a narrow, limited range.

And you are quite right in saying, what they did was to make a single breach in the separation of power which enabled Congress to remove an Executive who was unworthy of his office, within these circumscribed terms. That is one of the most valuable parts of the Constitution.

Senator HRUSKA. Now, when we get to "good behavior", there is not express assignment of the power, and no express language with which the judiciary has the power to discipline their own within the own ranks. But, that is when we can fall back on the precedent of the common law in England, isn't it? And before I get a little further along, there are some of us who didn't study Latin at all, and some of us who studied it are kind of rusty.

Mr. BERGER. Including me.

Senator HRUSKA. Now, may I ask for the purposes of the record, as well as for my own sharpening of appreciation, for a brief description of the definition of the writ of scire facia?

Mr. BERGER. One who had granted an office—and remember in early English history, there were many grants of office. A Lord, for example, would own huge forests, and he would appoint a forester, somebody who would be the general manager and in charge of the forest. He would appoint him on "good behavior". And in those days the forester had a property interest, he was given the office for life, except so far as he transgressed the mandates of "good behavior".

Now the forester misbehaves, he misconducts himself in office in one way or another. At that point the Lord could go to court with a writ of scire facias and say, "I beg to have a declaration that this office be forfeited": that is the meaning of scire facias. I couldn't translate in from the Latin for you, exactly what the words mean. But that was the content.

Senator HRUSKA. The description is better than any definition. Now, it was upon that that the judiciary in England in the olden days, and through the medium principally of the King at the bench—

Mr. BERGER. Yes.

Senator HRUSKA [continuing]. That the writ was processed, and that judgment was had accordingly on the basis of "good behavior", or, to put it the other way, of "misbehavior"?

Mr. BERGER. That is right, sir. And this has been done in quite a few cases, with the exception of judges. And we want to bear in mind, why not judges? Well, for the reason that almost all judges, with the exception of a couple of "sports" we'll call them, were at the pleasure of the Crown. All the appointments were at the pleasure of the Crown.

You remember James "lopped" off the head of Sir Edward Coke, Coke was thrown out of office—the greatest mistake James ever made because he made Coke his greatest opponent in the Parliament.

But there is an example that the Crown had the complete power to discharge. Now, it so happened by historical accident that there were two judges—Sir John Archer, and for the moment I can't remember the name of the other—so, they refused to depart the office. And they said, "The only way that we can be thrown out of office is through scire facias, the time-honored way of declaring a forfeiture with respect to other offices. And the analogy is, if you can forfeit a mayor's office, you can forfeit a judge's office, the great English judges said so. And, they didn't leave their offices, as a matter of fact.

And I cited, for example, where Solicitor General William Murray later Lord Mansfield, was asked about an injudicious appointment Governor Clinton made in the Colonies, "What can we do about this judge who holds on "good behavior". Murray said, "That's too bad, we never make an appointment on good behavior; now he's got to be removed by forfeiting his office."

So, this is a traditional procedure, and whether or not the writ of scire facias is obsolete, it can be replaced by using some modern remedy.

Neither the court nor the Congress have ever felt limited in fashioning remedies. In addition to what you said about Marshall, I could cite you another one, I think it's in McCulloch against Maryland, when he said, "Given the end, if that's clearly spelled out, we are justified in fashioning the means;" otherwise you abort the intention of the framers.

The consequence, for example, of saying, "We are powerless, the judiciary is powerless even in the exercise of its own power; or with the aid of Congress through the necessary and proper clause to use a remedy", the consequence is to say, certain misbehaving judges—let's call them habitual drunkards—are forever insulated in office. You have a horrible result.

Senator HRUSKA. Professor, in your summary you say it is highly desirable for Congress to enact legislation under its "necessary and proper" power, and confirm and facilitate judicial removal of judges for "misbehavior".

We had as witness Judge Ainsworth of the Fifth Circuit whose attention was called to U.S.C. Section 332(d), that is the section that deals with the judicial council of the several circuit courts of appeal, as you know.

Now, subsection (d) reads like this:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

Would you consider this ample authority, legislatively, upon which

to base procedures like those you have been advocating, where the issue of "good behavior" arises?

Mr. BERGER. Since that has been a much debated question, I think clearly it is desirable to meet it head-on by a bill that takes care of it along the lines of the Nunn bill. Because here is something that is long overdue, and which the Senate is beginning to consider only in this generation.

For that reason I would prefer something that's perfectly clear, because there has been considerable debate about the provision you read to me. And I think, having a bill like the Nunn bill, accompanied by legislative history, and the analysis that we had put before us, we will have something that will quiet any doubts.

Senator HRUSKA. I observed yesterday that in informal discussions with a number of the judiciary, their answers thus far were just about what you have given, that they hesitated to use this general language to go into a field which is still unexplored, and unused, without some congressional mandate, and some congressional prerequisites spelled out expressly.

Mr. BERGER. I believe that's the part of wisdom. Normally I am not one that believes there ought to be a law for every occasion, and if a law on the books lends itself with interpretation, I'm prone to go along with that and say, "let's work with that". But, this is a matter that has been much debated, and though I feel that Judge Merrill Otis' job—which he wrote back in 1936—he wanted a degree from a university, so he submitted a dissertation at that time—I think it is a meritricious performance, but his name carries weight. That has just been rehashed by a district judge in Cleveland, Judge Battisti, who sent it to me; Such writings create doubt. I am sure there are fine Members of Congress who have a doubt. So, to meet the thing head-on and spell it out is desirable.

And, above all, this is not just doing a favor to the judiciary, it is first of all getting rid of an obnoxious job for the Congress. You've got to act because in the absence of something like this bill—as Senator McAdoo said back in 1936—the judges feel they are immunized, that you can never reach them. For 20 years Judge Johnson in Pennsylvania besmirched the whole court system there. You've got to meet that head on.

Senator HRUSKA. Of course, I imagine that some of the judiciary undoubtedly feel—there are some who feel this way—they feel they are unjustly being accused of being activists; and some people consider activists as meritorious, others take a different view. But certainly, if the course of conduct which we try to describe in this bill were exercised under the language of subsection (d), might not the criticism be raised that they are going beyond their delegated authority, that they are becoming members of that so-called activist class of jurists? I say that without derogation one way or the other.

Mr. BERGER. Obviously, Senator. Given the exercise of such power for the first time, I wouldn't rest on debatable inferences from broad language, I would prefer to meet it head on.

Now, let me address this "activist" thing for a moment. I might say my political complexion may be labeled as liberal—I've been a long-time liberal, and I'm now 75 years old—I am anti-activist; I

don't like radical activists, I don't like conservative activists. I didn't like it, for what it's worth, when McReynolds and company and others were reading their economic predilections into the Constitution, countering what Justice Field called the tide of "socialism and communism"; that was one form of activism.

I don't think you can impeach a judge for declaring a law unconstitutional. Were a council of judges to remove a man because he was an activist judge, whether it is in Negro cases, union cases, or anything else, I would feel that is a very serious offense, an abuse of power. They themselves may be subject to measures, whether removal for misbehavior, or even impeachable offenses. But, I think it would be an abuse of power to use the mechanism you are spelling out here to remove a judge because you differ with his opinions. That, to me, is unthinkable.

Senator HRUSKA. Professor Berger, your book did furnish at least 2 hours of very delightful and contemplated effort on my part last night; and once I got past the second page it became easier and easier because of the fascination of the subject and the fashion in which you dealt with it.

I shall call attention to two footnotes, one at page 141 of your book, and it's footnote No. 90, and I will read it.

> Assistant Attorney General (now Justice) William H. Renquist testified before the Senate Subcommittee on Separation of Powers on the Independence of Federal Judges, hearings in the 91st Congress, Second Session April and May of 1970, at page 330, that it is "the opinion of the Department of Justice" that the provisions of the Tydings Bill, S. 1506, relating "to a new judicial commission to remove judges in case of failure to conform with good behavior standards of the Constitution are constitutionally permissible."

Mr. Chairman, I have ferreted out the document in which that testimony was given by the Assistant Attorney General Renquist at that time, and it is to be found in the hearings that were held on April 7 and 9, and May 7 and 8, at page 330. I ask unanimous consent that there be spelled out and included in the record at this point the pertinent statement by Mr. Renquist in concise form, which will form the basis for that footnote to which I referred.

Senator BURDICK. Without objection, it is received.

Senator HRUSKA. Only two more points, Mr. Chairman, you have been so patient, and I appreciate it.

There is another footnote at page 174, and this is footnote No. 235, and it says, "During a Judicial Conference in 1969 Chief Justice Warren E. Burger, then circuit judge, stated that the Tydings bill constituted no threat to judicial independence, nor invasion of the separation of powers."

The Judicial Conference of the United States proceedings at pages 42 and 43 are quoted by John H. Hollowman in his article, "The Judicial Reform Act: History, Analysis and Comments", 35 Law and Constitutional Problems 128, 138, (1970). So, too, while testifying before the Senate Judiciary Committee on his nomination to the Supreme Court Associate Justice Harry Blackmun saw, "No great danger of interfering with the independence of the judiciary" in the Tydings bill. That can be found precisely at page 52.

Mr. Chairman, there are documents here from which the staff may glean those exact responses by Chief Justice Burger and Justice

Blackmun. I ask unanimous consent that the pertinent parts be concisely and in context set forth in the record.

Senator BURDICK. Without objection, it is so ordered.

Senator HRUSKA. Professor Berger, in making these requests I'm not trying to impugn on any of your probable accuracy in citing these things. I just want them to be readily available because these hearings will be read by Members of Congress after this committee's processes.

I want to thank you again. I am sure I could have found it if I took enough time to do it, but reading your book I found it in 2 hours.

Now, the final point I make, Mr. Chairman, is this—and, Mr. Dixon, will you hand to the witness a copy of Judge Ainsworth's testimony of yesterday—there, Professor Berger, you will find at the bottom of page 6 the five points which the Judicial Conference in its March, 1975 session, approved the legislation in principle without approving the specific provisions of the bill.

And then it was suggested that the five specific suggestions which were proposed, that this committee take into consideration in studying the legislation now before it.

I ask unanimous consent, Mr. Chairman, that the text of those five points be set forth in the record at this point.

Senator BURDICK. Without objection, so ordered.

[The document referred to is as follows:]

[EXCERPTS OF TESTIMONY REFERRED TO BY SENATOR HRUSKA]

Mr. REHNQUIST.

I briefly recapitulate the testimony I gave before the Tydings committee to the effect that in my opinion and the opinion of the Justice Department the provisions of S. 1506 relating to a new judicial commission to remove judges in cases of failure to conform with the good behavior standards of the Constitution are constitutionally permissible.

And the second point I expressed before the Tydings committee was the idea that the provisions of S. 1506 dealing with involuntary retirement of judges for disability were very arguably constitutional since any judge who was involuntarily retired for disability would retain a judicially enforceable right to perform the amount of work which he was able to perform.

(Hearings, Independence of Federal Judges, p. 330)

The CHAIRMAN. Judge, Senator Tydings has a Conference Committee. He has requested that I read you five questions that he intended to ask.

* * * * * * *

The CHAIRMAN. Number 2: For the past 4 years the Subcommittee on Improvements in Judicial Machinery has been studying the few cases of the physically disabled Federal judge staying on the bench when he should retire, or the very rare occasion the unfit judge. The subcommittee drafted a judicial reform proposal. The essential part of the proposal is the establishment of a Judicial Commission on Tenure and Disability which would be composed of five Federal judges assigned to the Commission by the Chief Justice. The Commission would investigate all claims of judicial disability or unfitness and make recommendations for involuntary retirement or removal by the Judicial Conference. The decision of the Judicial Conference could be appealed to the Supreme Court.

Do you think this would interfere with the independence of the Judiciary or be inconsistent with the doctrine of separation of powers?

Judge BLACKMUN. I will try to answer the latter part first. I see no great danger of interference with the independence of the Judiciary. The incapacitated judge can be a distinct problem. It is the other side of the coin of life tenure. On the other hand, I think it is section 332 which in my vief gives

the Judicial Council of a circuit a great deal of discretion in administering the problems of the circuit. We have used it, utilized it on occasion with respect to district judges who are somewhat incapacitated. It has fallen to my lot to do some of this. It is not a pleasant assignment. I think we have carried it off successfully.

What I am saying is that there are ways and means in my view on the statute books today. I would not want to comment because I am not qualified on methods of improving existing statutes. That to which Senator Tydings refers is an alternative. Perhaps it is a better way, but again I come to where I started that I see no great danger of interfering with the independence of the Judiciary in such a provision.

(Confirmation Hearing on Justice Blackmun, p. 52)

JUDICIAL CONFERENCE SUGGESTIONS

After careful consideration of these provisions, as contained in S. 4153, 93rd Congress, the Judicial Conference of the United States at its March 1975 session, approved the legislation in principle without approving the specific provisions of the bill. The Conference went on to make five specific suggestions which it proposed that your committee take into consideration in studying the legislation now before it. These suggestions are:

(1) That any reference to Justices of the Supreme Court be eliminated inasmuch as sufficient means exist through the impeachment process; further, that it would be inappropriate for judges of the inferior courts to pass judgment on an action of a Justice of the Supreme Court; and lastly, by statute the Judicial Conference has no jurisdiction over the Supreme Court.

(2) The Conference believes that neither a judge or a Justice of the United States may be removed from office except by the impeachment process.

(3) The Conference is of the view that following a hearing before a commission of the type proposed in this legislation and following review by the Judicial Conference of the United States and further review by the Supreme Court of the United States, mandatory or involuntary retirement of a judge for physical or mental disability (including habitual intemperance) may be ordered with the judge so charged being relieved of his judicial duties.

(4) The Conference suggests that a judge may similarly be retired mandatorily (or involuntarily) for serious misconduct and he may be relieved of any further judicial duties.

(5) The Conference suggests that the censure of a judge following a hearing before such a commission with review and appeal may be imposed as a less severe sentence than mandatory or involuntary retirement.

Senator HRUSKA. Professor Berger, after you have perused these points, which no doubt are familiar to you from a previous reading, would you have any comments; and particularly I would like you to focus attention on points 2 and 3.

Mr. BERGER. Well, before you get to point 2, first permit me to make a personal remark.

Mr. Chairman, in my chapter there are 335 footnotes, and I am simply enchanted that Senator Hruska has summoned the patience to go through those footnotes, it delights my soul. I want to thank you personally.

Now, as to the first point, suggesting the deletion of any reference to Justices of the Supreme Court, that they be removed through the impeachment process, and that it wouldn't be appropriate for judges of the inferior court to pass judgment on Justices of the Supreme Court.

Without talking about the statute, whether the statute gives jurisdiction, just for the first point, the Supreme Court has never been sacrosanct to me. There have been Justices on the Supreme Court

who were not nearly of the stature of Judge Learned Hand, for example; and if I would be ready to remove a Judge Learned Hand by this process, I would certainly be ready to remove a Supreme Court Justice.

Good behavior attaches to both: the tenure of the Justice is also based on good behavior, they are no different from judges. Why should we set them apart? May I remind you that the First Congress rejected John Adams' suggestion that we call the President "His Excellency"; I have always maintained that we must stop exalting the President, and regard him as a human being. Why not apply that to the Justices? There is nothing exalted about a Justice, he is just a man that has been appointed to that place.

He is within he constitutional language and should not be treated any differently. As a matter of fact, if you have accusations of a grave nature against a Justice of the Supreme Court, why should we say, "Well, we have to use this cumbersome impeachment process." It is, James Brice said, "like a piece of heavy artillery"; it takes forever to train it; you have to have tremendous public excitement, such as we had with Nixon, to bring it into action. So, for all intents and purposes it is virtually unavailable.

Senator HRUSKA. If you will yield, Professor. I believe Judge Ainsworth pointed out in his testimony—I'm not sure, but if he did, I don't think it's inherent in this statement here—not that the Supreme Court Justices are above the provisions of the Constitution, nor are they above being accused or charged with high crimes and and misdemeanors. All point No. 1 says is do not include them in the statutory provisions which call for the judiciary to pronounce judgments on a Supreme Court Justice because of the inappropriateness, the impropriety of inferior judges—that is judges on lower echelons—to pronounce judgment on their superiors.

The implication is that if there is such misbehavior they should be held accountable. Throughout our system of government, accountability is one of the perennial, inseparable elements. If there are transgressions, it will be left to the power of impeachment of the Senate. Does that make any sense?

Mr. BERGER. Well, I thought I was addressing myself to the distinction you are making. I appreciate the argument, but I say first of all, that while judges can be impeached, they are also subject to good behavior. By the very terms of the Constitution both judges and Justices enjoy their office only during good behavior.

It is to me an inadequate argument to say that it's inappropriate that inferior judges should try them. My answer to that is, a grand jury could indict a Vice President, a grand jury on which sits a plumber, an automobile mechanic; he is tried by a jury of his peers in the good old American way.

I don't for a minute admit that Justices are beyond criticism. They are being criticized from hell to breakfast; they are being criticized by law review commentators, including Raoul Berger.

I start with something quite different. I don't start with an exalted notion of looking up to the Justices, they are just judges. I say the President is our "Man Friday," and I say Justices are our "Men Friday"; they have to be called to account like everybody else. The

minute I say Supreme Court Justices can't be tried by the lower court, then I have to say the same thing for a Court of Appeals judge.

Even the President would have been indicted if he hadn't been pardoned, and who would he have been indicted by? By a bunch of ex-Presidents?

Senator HRUSKA. By the Senate.

Mr. BERGER. He would have been indicted in a criminal proceeding by a grand jury.

Senator HRUSKA. Impeached by the House, tried by the Senate.

Mr. BERGER. He could be impeached by the House, but he could also have been indicted.

Senator HRUSKA. Yes, indeed.

Mr. BERGER. Who would he have been indicted by, Senator?

Senator HRUSKA. Well, I think that the process of accusation and trial, that is for the regular court to do, but not on the point of removing him from office.

Mr. BERGER. That's right, let's forget about the removal.

Senator HRUSKA. He could not have been removed by a criminal court.

Mr. BERGER. I agree with you on removal. But, what we are talking about is the inappropriateness of trial. What I am saying is that the most exalted officer in the Government, the President, can be accused by an ordinary grand jury, and can be tried by an ordinary jury.

So, when you say that is inappropriate, I just can't buy that.

Senator HRUSKA. Fine, you made your point on it. Now, what about point No. 2?

Mr. BERGER. Oh, well, I believe that is also against everything I said to you this moment. That virtually insulates judges who are crooks in office.

Senator HRUSKA. Could you consider point No. 2 in connection with point No. 3?

Mr. BERGER. The point I am making, history has proven we certainly cannot use this cumbersome impeachment process to get rid of a little crook. And when you take point 2 and say, neither a judge or a Justice may be removed except by impeachment, you are saying those crooks can enjoy immunity; and history proves it.

So, what I'm saying to you, here is a housecleaning job that you can't afford to undertake, nor can the democracy afford crooks in office, because it discredits the judicial system. Albert Johnson was sitting in judgment for 30 years when the whole community knew that he was a crook. Therefore, I reject No. 2 on practical grounds.

Bear in mind, what they are really talking about is sort of an Emily Post etiquette; they are not talking about constitutional barriers. The Ainsworth point says it's inappropriate and he doesn't believe Justices should be removed, except by impeachment. And I say to you that is an argument that just insulates misbehaving judges.

Mr. Senator, I want to make one point because it is for me a grand underlying fundamental. I was tremendously distressed when, right after Ford took office, the newspapers were full of the fact that Jerry was going in his bathrobe to the door, picking up his bottle of milk

and his newspaper. Well, I have done that for 40 years, and nobody ever gave me any points for it.

So, all I want to say to you is this, Senator, we've got to get out of the habit of looking at people in public office as exalted figures. They are what Iredell, one of the founders who later became a Justice, said, "They are our servants and agents". You use the word "accountability", that's a grand word. I don't think anybody in public life has beat the drum more consistently for Congress than I have, but that is not because I regard Members of Congress as a collection, with all respect, of demigods, but because it is a marvelous debating forum; it's the "national town meeting"; there will always be found men who have the courage to differ. But that doesn't attach a special sanctity to them; we attack them, we later sweep them out of office. I want that vein of thinking not only for the President, but for the Congress and the Supreme Court Justices, too.

As I said, I'm not an activist, and I hold myself free to criticize judges who are activists. I hold myself not only free to criticize judges but to say, if they are unworthy, remove them. Don't immunize them in any way, that would be my answer to Judge Ainsworth.

Senator HRUSKA. Well, these points I bring up because the Judicial Conference was trying to be helpful to the cause, the consideration of some sort of legislation in this area. And by laying out these points, I think they hope that we are going to subscribe to them and approve them without a lot of consideration and perhaps without a lot of variation and amendments, and some changes.

But, they are helpful to set the limits within which we can with some assurance begin to draft a bill to submit to the Senate and later to the House.

May I suggest this, professor, you are a busy man, too, it's not only the Members of the Senate that are busy, but if you will take this statement of Judge Ainsworth and consider further those five points, and submit a brief commentary on each point and include it in the record, it would be helpful.

Mr. BERGER. I must regretfully decline, I'm in the middle of another book, and it is engaging all my energy. I'm an old man, and I've got to stay with that job. I don't have a contract to live forever.

But, I think you made a good point, Mr. Senator, when you said within certain limits; let me reemphasize, we certainly shouldn't countenance removal of a judge for his opinions because, for example the Court of Appeals is nonactivitist and a district judge is activist. Notwithstanding, I don't like activitists on the bench who revise the Constitution, and dictate policy, instead of trying to give effect to the intention of the framers, as far as we can ascertain.

But, having said that, I still wouldn't want to give the power to this Conference for removal on grounds of activism. So, I'm with you —boundaries such as abuse of power, criminal misconduct, neglect of duty—those are grounds that commend themselves to anyone. Any man that comes to court and waits for hours and hours on a judge who doesn't show up because he's in a drunken stupor will appreciate that.

Now, to go back—and maybe this is unworthy of me, maybe I'm prejudiced—were I a judge, I would have the professional feeling,

"Well, we really ought to be removed only by impeachment", and that is very unlikely to happen in any case because in the 170 years we had just nine impeachments of judges—well, maybe I'm off there, but certainly of judges, and one Justice, not more than nine.

So, a judge that sees that will say, "Well, chances of impeachment —and I'm not talking about high-minded judges; I'm talking about the few judges who without that deterrent might engage in exactly that kind of misconduct we had down the years—there may be just enough "clubishness" among the bench to say, "Well, let's leave it as it is". But I want a more convenient process.

For example, I was unsympathetic with regard to Justice Douglas. He stayed on the beach when he was really a very sick man.

Senator Hruska. Thank you very much, professor. I kind of like to recall the slogan of one of my professors in law school, he said, "If in my lecture you think I'm right, agree with me and support me; and if I'm wrong, tell me about it". The attitude that you have displayed here today sort of epitomized that.

So, thank you very much, personally, for your appearance.

Senator Burdick. Senator Scott?

Senator Scott. Thank you, Mr. Chairman.

Professor Berger, I'm in agreement with your thought that any bill that is passed should bind all judges. As I recall, the same sentence is used in the Constitution—good behavior relates to all judges, both the inferior court and the Supreme Court Judges. I appreciate your feeling on that, and certainly, you presented a very persuasive and very logical discussion. And yet, sometimes our court decisions may not appear to be as logical as you have been today; and going back to the early law, even you admitted that were you a judge, that perhaps you would feel that you should be removed only through the impeachment process.

Now, having said that, I wonder if you have any decisions whereby a Federal judge could be removed without, initially, the impeachment process.

Mr. Berger. It has never been used.

Senator Scott. It has never been used. Well, I have some doubt as to the constitutionality of it. I just wonder, I know that you are advocating the enactment of this bill, and certainly I am in agreement with the theory of it. But, we are talking about new grounds. And, I don't believe that any of us would be dogmatic enough to say this is the way the court would hold—we don't know what the court would hold if it was presented.

You favor an enactment of this bill. Would you back it up by any constitutional amendments with regard to the tenure of a judge? It takes some time to get a constitutional amendment adopted; and, of course, it also takes time, as the Chairman remarked last week, to get a measure like this enacted and tested, so that it actually would be in effect.

Mr. Berger. Are you advocating an amendment?

Senator Scott. Oh, yes, I do advocate an amendment. I have sponsored an amendment for a 10-year term with reconfirmation at the pleasure of the President and the Senate.

I am not disagreeing with the remarks you made, and I hope you are right. But I don't believe we know whether you are right or not until the court has——

Mr. Berger. Well, if you don't pass the bill, the court will never speak.

Senator Scott. I'm in agreement with you.

Mr. Berger. Thomas Jefferson said that, Mr. Senator.

Senator Scott. Now, you have heard the classic example of a lawyer addressing the Supreme Court, and one of the Justices remarked, "But, counsellor, that's not the law", and the lawyer responded, "It was until Your Honor spoke".

We don't know what the Supreme Court is going to hold.

Mr. Berger. Well, where does that leave you?

Senator Scott. We might pass this law, but we should back it up by a constitutional amendment for tenure of judges, in reserve if the court ultimately holds the law unconstitutional?

Mr. Berger. Oh, you are suggesting that in addition to passing a law of this kind there should be a supplementary move to get an amendment?

Senator Hruska. Will the witness yield? The lights on the clock indicate that a rollcall vote is in process on the Senate Floor. We will recess briefly until the Chairman returns. I presume he is on his way to the Senate Chamber to vote.

Senator Scott. Mr. Chairman, could we get an answer to this because I cannot come back.

Senator Hruska. Sure.

Senator Scott. If you would, Mr. Berger.

Mr. Berger. I see the logic of your propsal, Senator Scott, but since I don't regard the issue as debatable as you do—and I say this not on the basis of any authority I could claim, I say this on the basis of study in depth, of having spent many, many weary months—I am convinced myself—and I might not have convinced you—but I would urge you to do what Senator Hruska did. I would urge you to take a couple of hours to read those chapters.

Senator Scott. Mr. Berger, I have the highest respect for you as an authority on the Constitution, I'm not talking about that. You may be right, and the Supreme Court could be wrong, but they still would be the governing authority.

Mr. Berger. Let me address myself to that.

Senator Scott. Let me add one other thing——

Mr. Berger. No, no, no, if you will forgive me, sir; let me address myself to the question you asked me, so we can have the record clear on that.

Senator Scott. All right.

Mr. Berge. You asked me why I'm not for an amendment. The reason I'm not for it is because I'm convinced that the issue is not nearly as debatable as you think it is.

Senator Scott. All right.

Mr. Berger. Wait, now——

Senator Scott. You might want to rethink this, because last week we recited several Justice of the Supreme Court in *dicta* in which they disagreed completely with what you just told us.

Mr. BERGER. You've got Rehnquist, and Burger, and Blackmun who were read into the record by Senator Hruska.

Senator SCOTT. These were remarks made in decisions by the Supreme Court of the United States.

Mr. BERGER. As you mentioned, dicta.

In any event, we've got an honest difference of opinion. You asked me would I back an amendment as a supplement, and I stated for the reasons I stated that I wouldn't.

Senator SCOTT. You do not feel that it should be——

Mr. BERGER. That it's necessary. I don't think it's necessary, and it would encumber your efforts to get a bill through.

Senator SCOTT. Mr. Chairman, I'm going to have to answer to my name. Thank you very much, Mr. Berger, I've enjoyed hearing your thoughts.

Senator BURDICK. We'll be in recess for about 10 minutes.

Mr. BERGER. Very good, sir.

[Whereupon a 10-minute recess was taken.]

Senator BURDICK. We are certainly grateful for your testimony today, Professor, I have enjoyed it very much. I didn't have a chance to read your book last night, but I got a pretty good review of it today.

Mr. BERGER. You have two footnotes which I wouldn't have thought of citing in my statement.

Senator BURDICK. The thrust of your testimony is that we should settle the matter. We had hearings in the past, some years ago; and now we should settle it.

May I ask you this question. We know we could settle it by constitutional amendment, don't we?

Mr. BERGER. May I be candid with you, Mr. Chairman?

Senator BURDICK. Yes.

Mr. BERGER. That's the "kiss of death". Getting a constitutional amendment requires an issue of the highest moment which agitates the whole community. It's got to be something that excites public passions. Do you think for a moment you could whip up any interest that a senile judge, or a sick judge——

Senator BURDICK. I'm not so sure the public isn't ready for something.

Mr. BERGER. I would bow to your judgment of the public pulse because that is your field, and you are much better in judging political events than I am. But, I have seen enough in my fairly long life of what happens to amendments. I can remember, for example, the struggle by a Southern politician and Everett Dirksen, to undo the reapportionment decision, and what a struggle he had.

To get it through the Congress you need two-thirds on both sides; whereas, to get a bill through you just need a majority. And, an amendment is, to me, the last measure of desperation, if you can't do it any other way, it's there, you can make a stab at it. But my own feeling is, before we start talking about the law, why should the Congress have to grind to a halt in order to consider whether to remove a crooked judge, or whether a man is too old to serve on the third circuit, for example, like Buffington and Davis.

It just makes good sense, good administration that Congress should be free to deal with the tremendous issues that are before it every day.

Senator BURDICK. We are not arguing about that, the necessity of something being done: I think we all recognize that.

Mr. BERGER. The reason I make that point, forgive me, Mr. Chairman, is that's the kind of a reason that the Supreme Court itself would fully understand, and say, "We ought to do our own housecleaning."

Senator BURDICK. I just want to let you know that we had some witnesses here before this committee, and one testified as to a judicial tenure act in Virginia; and the other one on the judicial tenure act in California. Both of those were created by a constitutional amendment by those States.

Mr. BERGER. But, in California amendments are a dime a dozen, they are accustomed to amending their constitution, whereas in our whole 170 years we have had 25 or 26 amendments; it's like pulling teeth.

Even with all the power of women's lib, you've still got a problem of getting the equal rights amendment across.

As I say again, with genuine deference to your political judgment, you are picking a hard road because I don't think it will excite enough public interest. This is really a housekeeping measure, that's the way it looks to me.

Senator BURDICK. One thing has been intriguing me a little bit on the historical background you gave us today. What was the historical background of the term "high crimes and misdemeanors"; your testimony seems to separate the serious crime, the impeachment, and the lesser offenses of misbehavior, misdemeanor. What is the historical definition of misdemeanor, is that something big, or something small?

Mr. BERGER. To begin with, high misdemeanor has no relation at all with misdemeanor. This is an extraordinary fact, but it is so. Remember, impeachment was a parliamentary proceeding. The first impeachment, back in about 1380, of the Duke of Essex, proceeded for treason and other high crimes and misdemeanors. So, what was meant by high misdemeanors?

Now, long before there was such a crime as misdemeanor, parliament developed high misdemeanor, and it usually proceeded with it again a minister for a high crime against the state, whereas misdemeanors were based on offenses against the individual. Misdemeanors in English law never entered parliamentary impeachment; high misdemeanors under parliamentary law, never entered into English criminal law. So, you start with that.

Now, a high misdemeanor was a very serious thing. They proceeded, for example, for neglect of duty; the admiral who has neglected to safeguard the sea; the high commissioner——

Senator BURDICK. Excuse me. Off the record.

[Discussion off the record.]

Mr. BERGER. To put it in a nutshell, the Parliament proceeded against high ministers of the King, that's where it originated. You had favorites like the Duke of Buckingham; or Lord Chancellor Francis Bacon—that was one of the early impeachments, about 1620—who was engaged in acts which amounted to bribery. He was impeached and removed from office. They went after the big-shots for

serious offenses, and usually as a means of tearing down the favorites of King Charles II, like the Duke of Buckingham, who was subverting the constitution. That was the most serious crime, subverting the constitutional processes.

Now, normally good behavior, breaches of good behavior concerns small fry, a chief forester, or something of the sort; it didn't concern serious high crimes; such breaches weren't even crimes for the most part. But, diligent conduct of the office can embrace misconduct of office of any kind.

Am I responsive to what you are seeking?

Senator BURDICK. You are responding very well. I wanted the record to show that the misdemeanor and its historical background is not the misdemeanor referred to in common parlance as misdemeanor today.

Mr. BERGER. That is right. If I may add to what I have said this: This is to be found in my chapter that deals with high crimes and misdemeanors; and I must say I was really gratified that a very, very large part of the House Judiciary Committee was persuaded by my analysis, and their report is in very large part based on it.

But the first mention we get, as I say, of a high misdemeanor is way back in 1380, and it wasn't until about the early part of the 16th century—almost 200 years later— that you run across a misdemeanor for the first time. Before that time, curious as it may seem to you, but I think it's worth mentioning, there were felonies, very serious offenses, and trespasses. You are familiar with trespasses; in your torts law, if you recall, you could bring a writ of trespass; and there was also a crime of trespass. Now, trespass disappeared and was supplanted by misdemeanor in the early part of the 16th century.

So, you have totally different origins. I found the historical materials that showed what high crimes and misdemeanors meant: high crimes and high misdemeanors. And a high misdemeanor was an entirely different breed of cat than a misdemeanor in criminal court. Traditionally, in England, you don't find high misdemeanors in criminal court, and you don't find misdemeanors in impeachment proceedings.

Senator BURDICK. Apparently, what they did, they removed the distinction between them. If it was a serious crime it was a felony or a high misdemeanor.

Mr. BERGER. Well, for the purposes of criminal law, a felony, for example, would be murder, rape, things like that. The lesser crimes originally were trespasses, assault, battery. But, a misdemeanor was definitely a lesser crime than a felony, quite different, in the criminal proceedings. But it is irrelevant to impeachment because it never crept into the impeachment parlance.

Senator BURDICK. I see. Staff has a question or two.

Mr. WESTPHAL. Professor Berger, if I can call your attention to page 14 of the bill—I believe you have a copy of the bill in front of you—and in the beginnng of line 5 on that page they propose a new section 372a, removal of judges. In the language, beginning at lines 10 and 11 they say that the ground for removal is that the conduct of such justice or judge is or has been—and I quote—"inconsistent with the good behavior required by article III section 1 of the Constitution."

My question to you is this. I'm not sure from your testimony here whether you believe that this is sufficient statutory language in order to define what is the ground for removal; or whether your testimony has been that the Congress should supplement that language by attempting to specify what is mean by "bad behavior," by using terms such as abuse of power, neglect of duty, habitual intemperance, and some other terms.

Now, can you tell us what your opinion is on that?

Mr. BERGER. I'm grateful to you for asking that question. Some of what the bill has in mind appears under 2(b), lines 22, 24, etc. But I would prefer, since you asked me—it says "good behavior required by article III," and that is of course constitutional language. And then I would go on and add something like this, "For purposes of this bill "good behavior' shall be criminal misconduct in office, such as bribery, corruption and the like," you can use better language, so that on criminal misconduct in office you get a broader scope. Also include abuse of power, neglect of duty, and I would pick up, inability to discharge the office due to either mental or physical disability. I would say, mental disability which disables a man from discharging the duties of his office; habitual intemperance, too.

I would get these together as a definition, just as a matter of style. Some of these things appear at the bottom of page 14 and the top of page 15. I would pull them together in a definition.

Mr. WESTPHAL. The language on the bottom of page 14 which you referred to as section 2(b) of this new section that speaks of involuntary retirement, rather than removal. In other words, they would give you this power to involuntarily retire a justice or judge who is unable to discharge efficiently one or more of the critical duties of his office by reason of permanent mental or physical disability.

In other words, this is an involuntary retirement power whereas the language that I previously read to you, that is "inconsistent with the good behavior required by article III," is part of the new statute which would justify removal.

Let me try to get closer to my point. Do you believe that the additional phrases, such as you have suggested here, criminal misconduct in office, neglect of duty, habitual intemperance, should be written in the statute, or should they be made part of the legislative history?

Mr. BERGER. No, in the statute. Let me first of all say this, Mr. Westphal. I have talked with Senator Nunn early this morning, and he doesn't regard this draft as the last word, it's a springboard. I think this question you asked gives us a fine approach. I think you should have a definition of what is "good behavior," or lapse from good behavior. And, this bill requires redrafting, first of all, you want to remove any notion that preliminary investigation by the council is anything but an investigation, a removal phase of the hearing.

But I would revise this and let it apply across the board to whatever causes of removal, whether a man wants to retire voluntarily or not. This gives him the option of retiring voluntarily, and if he doesn't, you've got the basis for charges of breaches of good behavior.

Mr. WESTPHAL. In that connection, as I search for words that will try to give some evidence of the intent of the Congress as to what the phrase "absence of good behavior" means, I recall the fact that

in many of the State constitutions the terms "malfeasance, misfeasance, and nonfeasance" are used, and those terms are terms of art in this area.

Do you think that the use of those terms would add something, or should those terms be avoided?

Mr. BERGER. No, these are certainly departures from good conduct, but they are really more serious departures from good conduct, malfeasance in particular. I would want to refresh my recollection to just what misfeasance entails, and nonfeasance, before I jump on the bandwagon; but broad terms like that might be useful.

The starting point for me is this—and incidentally, Mr. Chairman, I applaud the approach of your counsel, I think that is highly desirable, tighten what we are talking about and get it in the statute.

Senator BURDICK. Of course, we get into other problems, too, when you try to define misconduct, or bad conduct; sometimes you are going to have difficulty how you use the power. Suppose a district judge had been reversed 80 percent of the time, is he abusing his power?

Mr. BERGER. I want the legislative history to show that a man shouldn't be subject to removal because the court of appeals differs with him; because he is not sufficiently activist, or too much activist, or because he has been reversed. Bear in mind, the Supreme Court by 5 to 4 from time to time reverses itself. It sometimes held that 50 or 60 judges, or prior justices were wrong; what does that mean? The fellow that gets the last say is infallible, not because he is infallible per se, but because he is given finality.

So, I am not prepared to accept that because the court has differed 80 percent of the time with a district judge, that he is incompetent. Removal for incompetence, yes, but I want that proven. And although, after study and research, I have concluded that ignorance and incompetence might be a ground for removal, I would prefer to put that in a second, future step.

See, we are doing something that is innovative, we have neglected this for 150 years.

Senator BURDICK. Well, I want to call your attention to the fact we need a definition of what "bad behavior" is, and we might have to define the terms we specify.

Mr. BERGER. Well, I'm glad you called my attention to this. When you use "abuse of power," you could say in the legislative history, "we do not intend by this to convey that a difference of opinion between an appellate court and a lower court in any respect reflects that the district court has been abusing its power. It should take more than that.

This was the thing that Douglas was afraid of, you see, that a reviewing tribunal didn't like district court judges' rulings in labor cases. You can meet that head on.

Mr. WESTPHAL. I think you made the further point, that the fact the procedure set forth in this bill sets the judges themselves as the ultimate judge of what is abuse of power, or what is neglect of duty. That is sort of a safety valve on this because they really are peers of the man they are judging, and they probably have a better insight of what his conduct has been.

Mr. BERGER. I want to say something that is a little bit embarrassing on the record, but I'm going to say it nevertheless. My own feeling originally was to draw in circuit court judges, and district judges, and Justices of the Supreme Court. I did that on the theory of the cases that went to the Emergency Court of Appeals.

As I told Senator Nunn, I'm not taken with including the judges of the customs court, the customs courts of appeals, et cetera, because in my experience with them here in Washington, I found that such courts became a dumping ground for political hacks, they aren't of high stature. That is my experience, I may be prejudiced. And I feel if a judge is going to be charged, I want the best judicial panel; and I would prefer to draw from the district bench and the courts of appeal.

I hope I may be forgiven for speaking out in candor, but I think at 75 a man has earned the right to speak his mind.

Mr. WESTPHAL. I have one further question. If legislation of this type were enacted by the Congress, do you have any doubt that the power which would be given to the Council on Judicial Tenure and in effect the Judicial Conference would in fact be exercised by the judges who serve on these bodies, that they would do their own housecleaning, as you view it?

Mr. BERGER. Well, in some cases they have been able to do that, for example with respect to Stephen Chandler out in the Middle West —and Congress knows all the facts of that case—if we believe for one reason or another he was incompetent to deal with what was before him. But let's take the strongest case, the case where criminal charges were being preferred against Albert Johnson of Pennsylvania: I can't believe the Congress should deal with that. As a matter of fact, one of the courts of appeal judges from that circuit came down to the Senate and begged the Senate to do something about it—no, it was the House; he begged the House to do something about that, and they said it was too cumbersome.

I think the Conference would act. And of course, in a "stinking" case, if it was an impeachable offense, the Congress reserves the right to impeach. But I think the Conference is likely to carry it forward.

Mr. WESTPHAL. The reason I asked you that question, you made reference a few minutes ago to the situation in the third circuit where there was some question whether a couple of members of the court were too old.

Mr. BERGER. Buffington—they were about 90 years old, senile, and being used by one of the circuit court judges who was corrupt. They didn't know what they were doing, but he well knew.

Mr. WESTPHAL. I'm not sure whether at that time the statute contained a provision that it contains now, section 372(b), whereby the judge who was so old that he suffered a physical or mental disability to sit on the bench could be removed, he could be involuntarily retired simply by the judicial council of that circuit, certifying to the President that this disability existed.

Do you happen to recall whether that involuntary retirement power existed?

Mr. BERGER. I don't think at that time we had a provision. The provision, for example, would enable a Justice to retire and get his pension. That is relatively recent.

I want to say, you suggested another point to me, Mr. Chairman, and that is this: Here was a bill by Congress which really recognized a power of removal—to be sure, with pay—but that itself confirms the power we are talking about because, as was earlier said by the Court of Appeals in Virginia, very early, to make an office a sinecure, even though the man remains a judge, and to deprive him of all his functions, was an offense against the Constitution.

So, I would say that the statute that you, Mr. Westphal, quoted to me is a pretty good precedent—you will find it in a footnote in my chapter—it's a pretty good precedent for this bill.

One other thing, before I forget. I think this bill could profit from a close look of the sort you are giving it, a tightening and revision; and bearing in mind the Chairman's remarks that you don't want by definition to fetter yourself. And also bearing in mind that you've got to stay within the common law confines. "Good behavior" is a jurisdictional terms, you can't change that. But the fundamental meaning really is, "diligent conduct of office." For example, a man who takes bribes discredits his office, that's misconduct in office.

Mr. WESTPHAL. Let me now turn to one last point. You have suggested that it probably is not necessary to encumber the procedure provided for in this bill by having a formal hearing in the proceeding before the Council on Judicial Tenure. You suggested that hearing be eliminated, and the hearing be before the Judicial Conference after the Council on Judicial Tenure had in effect preferred charges.

Mr. BERGER. If I may interrupt——

Mr. WESTPHAL. Let me ask the question. I think you would agree that in the proceeding before the Council on Judicial Tenure the judge who is under investigation should receive notice of the fact——

Mr. BERGER. Oh, yes.

Mr. WESTPHAL [continuing]. That he is under investigation, even though he may not be entitled to full-blown due process at that particular point.

Mr. BERGER. I would give him notice. I would give him the right to come with counsel. I would give him the right to cross-examine. But I would be emphatic that this is merely an investigation and not a hearing; that the hearing will be before the Conference, so that you don't let him bog down your investigation.

You remember how James St. Clair was trying to exert every power he could to convert the Nixon investigation before the House into a full-fledged hearing, which was just another misconception of the function.

Mr. WESTPHAL. He was trying it in the House, rather than trying it in the Senate.

Mr. BERGER. That's right, that's exactly the point.

Mr. WESTPHAL. That is the point you make here, the hearing is before the Judicial conference, and not before the Council.

Mr. BERGER. The latter is just an investigation. You can be generous and give him very large rights, but it still is an investigation.

I don't really understand it, but I would cut out the provisions——

Mr. WESTPHAL. A hearing given for involunary retirement, but then you would not assign him.

Mr. BERGEN. Yes, that's right, I would get rid of that. Once he has been heard and has an appeal to the Supreme Court, the Conference can use him or not; no more hearings.

Mr. WESTPHAL. Isn't it somewhat inconsistent that you could reach a conclusion that a man is physically and mentally disabled from performing his duties of his office, and yet entertain an idea that at the conclusion you would put him back on duty?

Mr. BERGER. That's another way of voicing it, it's fatuitous as far as I'm concerned. I would give him every right before the Conference, and an appeal, and that's the end of it.

I have very high regard for the work your staff is doing, and I know that when your bill emerges with the help of counsel, Senator Nunn and his staff have really been working on this, you will come forth with a bill that will be first rate. And, like all of life's endeavors, it won't be the perfect definitive thing, but it will be a starting point and experience will shown ways in which it can be improved; and 10 years from now you can return and improve it.

Mr. WESTPHAL. Thank you, Professor Berger, I have no further questions.

Senator BURDICK. Professor, thank you very much for your contribution, it was very helpful.

Mr. BERGER. Let me say this, it has been a privilege to appear before you; I am truly delighted that you are thinking about the Nunn bill, because down the years you are going to be proud of doing a job like this.

Senator BURDICK. The hearing is adjourned.

[Whereupon, at 12:25 p.m., the subcommittee adjourned, subject to the call of the Chair.]

JUDICIAL TENURE ACT

WEDNESDAY, MARCH 10, 1976

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick, chairman, presiding.

Present: Senator Burdick.

Also present: William P. Westphal, chief counsel; Kathryn M. Coulter, chief clerk.

Senator BURDICK. The committee will come to order.

This is our fourth day of hearings on S. 1110, the Judicial Tenure Act. This legislation has received support in principle from the Judicial Conferences of the United States, from the American Bar Association, from the Association of Attorneys General and from others. Today, the subcommittee has an opportunity to hear from witnesses who have had experience in this area of overseeing the specific conduct or misconduct of specific judges.

One of our witnesses is Jack E. Frankel, the executive officer of the California Commission on Judicial Qualifications. The California Commission has been in existence since 1961, and Mr. Frankel will give us the benefit of the experiences over the past 15 years.

Our second witness this morning is Mr. Griffen B. Bell, of Atlanta, Ga., who, until March 1, 1976, and for a period of 15 years, had been a judge of the U.S. Court of Appeals, Fifth Judicial Circuit. Unfortunately, Judge Bell felt compelled to resign his judicial office in order to return to the private practice of law. Judge Bell will share his experiences in this field with us.

Because he has travel commitments for his return to the west coast, we will hear first from Mr. Frankel.

STATEMENT OF JACK E. FRANKEL, EXECUTIVE OFFICER OF THE CALIFORNIA COMMISSION ON JUDICIAL QUALIFICATIONS, SAN FRANCISCO, CALIF.

Mr. FRANKEL. Thank you very much, Senator. I am going to discuss the function and functioning of a judicial disciplinary and removal commission. And in the course, I will elucidate upon the procedure followed in California through the commission on judicial qualifications. And I will expand on any areas that I think might be of particular interest to the subcommittee.

As you know, unless a complaint against a judge has gone through the full procedure to the State supreme court, proceedings are confidential. So, with that proviso, my comments are not intended to apply to particular investigations or proceedings. Only those proceedings which have reached the supreme court stage are of public record. And my remarks are intended to apply to procedures in general, rather than any pending or closed case.

Also, furthermore, these views are mine alone and do not represent that of the State or of the California Commission.

The need for involuntary retirement arises when a judge, who cannot perform his duties due to mental or physical disability does not or will not recognize that that situation exists. When chronic illness prevents a judge from properly fulfilling his judicial responsibilities, it is vital that there be a workable procedure that will represent the public interest, notwithstanding general sympathy for the plight of a fellow human being.

What is to be done about those who do demonstrate unfitness in office? This is no reflection on individual judges anywhere. What is the remedy for a bad judge? Judges bristle at a question of that kind because they are so used to receiving malicious brick bats. The traditional view among judges is that anyone asking such a question must have some ax to grind; he has lost a case or has some reason to blame a judge, or, at the very least, he is encouraging judicial disrespect. We know, however, there are legitimate complaints. There are bad judges. There are frequent problems of disability, of abuse of power, laziness, lack of professional competence, and chronic ill temper.

Not all of these problems can necessarily be handled by a judicial disciplinary commission. But without the existence of a commission, the handling of such problems becomes, in my opinion, impossible.

So, removal from the office and other disciplinary measures are needed when there has been credible allegations of misconduct, wrongdoing, or some other infraction by a judge.

There are a variety of kinds of judicial unfitness. The most uncommon is simply bad health. Judges are sometimes physically or mentally unable to perform their work, yet will not recognize that, will not retire or quit voluntarily. Contributing factors to this condition might be advanced age or an alcoholic condition or loss of mental facilities, or simply a chronic physical condition that simply prevents the carrying out of a normal workload. The public interest demands an effective, independent means for investigation; for medical examination, including subpoena power and, when justified, to compell termination of office.

A completely different kind of recurring unfitness is the commission of misconduct or prejudicial conduct. This could involve favoritism, partiality, abuse and overreaching of the powers of the judicial office, and various types of intermixture of personal and business affairs with judicial responsibilities. In the extreme, it could include bribery or corruption.

Another important area is poor court demeanor. Judges sometimes act in ways which are bizarre, capricious, arrogant, and discourteous,

largely due to their personality and their temperament, and through little or no fault on the part of litigants or attorneys.

Lawyers and litigants have great difficulty in coping with judicial tyrants because of the power that judges wield.

Other areas of concern are procrastination, simple inability or failure to perform essential judicial tasks, and possible violations of the code of judicial conduct.

Frequently, in jurisdiction, there is a very strict code of conduct, but once a code is adopted, there is sometimes not any attention paid to whether it is enforced, how it is enforced, or who has the responsibility.

Certainly, I am not suggesting that most judges or anywhere near that have problems of this nature, but there is no question but that they are present in any large group of judges unless or until they are attended to. Here, I think I would like to digress for a few minutes to discuss the grounds which both in my experience in California and otherwise are useful to be spelt out. In other words, the basis for which a judge can be disciplined as far as having it written out, rather than having it developed through case law.

All States to my knowledge have some kind of a definition as a basis for discipline. And the more frequent ones, which I think are very useful, are: Permanent disability which interferes with judicial duties; second: Misconduct in office; third: Conduct prejudicial to the administration of justice that bring the judicial office in disrepute; and fourth: Persistent failure to perform duties of office. Those are the principal grounds in California and those have worked quite well.

There are two other areas which are not spelled out in California, and which, if I were asked my own opinion, I think should be added as a fifth and sixth. These are: Inability to perform duties of office. There is a distinction between an inability and a disability, and there is a certain area here where I think that is a useful thing to have. Finally, because it goes to the heart of certain criticisms that is justified, I would list abuse of judicial power as an additional grounds.

So those four that I mentioned, which are the principal ones in California, plus the inability to perform the duties of the office and abuse of official power, I would suggest, are possible grounds to be spelled out in terms of defining what misbehavior is.

Going on with the procedure that a commission affords, receiving, evaluating, investigating, and acting upon complaints by means of a commission, within the grounds such as I have spelled out in the law, provides a fair and workable plan within the judicial branch of Government. As we will see, this is fair from the point of view of judges who are accused, because their rights are thoroughly protected; and furthermore, it is a system within the judicial branch of government. It is not the legislative or the executive intruding upon the judicial power. So we find that today a great many States—well, my understanding is that 35 or 40 States—have presently on their books modern and effective judicial disciplinary removal and involuntary retirement procedures. Most of them, I think virtually all of them, are patterned after the California commission.

This plan permits an agency to receive complaints against judges at all levels of the state judiciary; causes them to be confidentially investigated; problems are corrected where that is possible; and complaints, which are baseless and unfounded, are closed; and those justifying further proceedings are set for investigation and ultimately hearing.

This can cause a judge to resign or retire or, if the judge chooses to contest the charges, the record goes to the State supreme court for disposition. This procedure serves as a vehicle for complaints from the public, the lawyers, governmental agencies, anywhere. There is continuity because the commission has regular meetings, procedure, issues an annual report, and it also provides impartiality because it is outside the political arena and is free from political and personal pressures.

I mentioned that many judges choose not to contest charges when they reach an investigation or hearing stage. The experience in California has been that not less than two or three judges a year have either retired or resigned voluntarily, rather than to confront the particular charges that are made. Sometimes this has been during an investigation when a judge is simply asked about say his health condition or, if it is an alcoholic condition, or whatever it is. In other cases, it has been after it has gone fully through the hearing procedure, but before it has gone to the supreme court. The important thing is that they are closed without any public furor, or without any harm done to the judiciary, because the existence and the procedures of the commission has caused the judge himself to recognize the situation that exists and to avail himself of retirement.

Going back to the ingredients of the commission plan as it exists, the expertise which judges and lawyers afford, Mr. Chairman, is very important and this enables the rights of an accused judge to be jealously guarded and the procedure to be a thoroughly judicial procedure, rather than some kind of extraneous method.

It is important to note that the members are individually selected for appointment to the commission; they are not on the commission merely because they have a judicial post in government. They are picked for the commission and in that capacity they act as a commission member and not an ex-officio member.

In other words, the work of the commission is not just a portion of the work of some existing court or existing agency that has some other administrative duties or appellate duties as its chief responsibility.

Many of the earlier schemes that had been worked out foundered because of that situation; that is, that the important disciplinary work of the body was simply thrown into some existing court. So this enables the commission to achieve a degree of prestige. It has an independent and respected status. And with a 4-year term of its members, it has a good sort of working life of its own.

It is very important that a group such as this have a permanent office and staff, even though it is very small. The California Commission staff has never grown beyond two; myself, as the professional person, and an office secretary. This office is readily available to the public and provides a means of dealing quickly with baseless

charges and dealing at greater length with more complex legitimate complaints.

Data from lawyers, bar association committees, citizens, could otherwise receive no significant examination but for this commission. The small staff, while owing allegiance only to the commission, has the privilege of calling upon other branches of government and other State agencies for assistance. Utilization of these resources by the commission staff is crucial to the success of the program.

This is especially true where there is lengthy investigation and where there is the actual prosecution of the case where the commission calls upon investigators and counsel who are not actually commission staff.

The work of the commission is publicized throughout the legal and governmental community and also, to a degree, in the media, particularly through an annual report, a copy of which I have attached to my remarks. That copy is for 1975. In addition, whenever there is action at the supreme court stage, it is a newsworthy items. So the public, to a considerable degree, is informed about the activities without it coming as an ongoing charge against members of the judiciary, which would have a counterproductive effect and would, in the long run, act to the detriment of the judiciary.

The publicity and the public information is kept at a level where it is a constructive kind of publicity, rather than there being a destructive kind of citing.

The report does not identify specific cases, but describes the work of the commission in general. So, the lesson to be learned here, I think, is that everyone performs better when someone might be looking over the individual's shoulder. In this way, a judge's conscience become a more active ingredient, a more active factor in his own work and in looking at his own performance. That has been, I think, a very great indirect benefit.

There are other benefits other than simply removing a judge who proves unfit. The work of the commission is of particular benefit to the judiciary in that it attends to charges which are made. Criticism is often unmerited or exaggerated or irresponsible and misguided and malicious. And the critics, whoever they are, can be asked to specify the misconduct. In other words, they are asked to put up or shut up and to itemize particulars if they do have complaints. Then these can be looked at and either closed or justified and proceeded with.

I might say that the overwhelming number of complaints are unfounded. Last year's figures of approximately 191 were closed without there being the necessity for even preliminary inquiry. This meant that almost 50 did go forward to further investigation.

So, once the effectiveness and willingness of the commission is established, its ability to dispose of its malicious accusations is enlarged. In other words, our commission has, I think full public credibility. If there is a charge made against a judge, then those who are interested in the public know that there is a place where this kind of complaint can be lodged. And if it is merited, then action can and will be taken.

The value of disability is appreciated when we consider that the judiciary is a natural target of criticism. This is a kind of protection

for the judges, which they simply do not have without the existence of an agency that is able to protect the judges by acting in cases that are justified.

The operation of the commission constitutes a careful program for dealing with delicate and persistent questions of ethics and conduct. A great deal can be achieved through skillful screening, evaluation, and investigation, and a careful judicious use of authority. And the presence of a small public institution such as the commission, possessing sufficient but carefully defined powers and competent to consider and deal with unfitness and transgressions, can significantly assist in raising the caliber of the judiciary, while at the same time increasing confidence of the public in the whole judicial structure. The end result is a strengthening of the judicial authority, rather than a diminishing of it.

Thank you.

[The prepared statement of Jack E. Frankel in full follows:]

PREPARED STATEMENT OF JACK E. FRANKEL, EXECUTIVE OFFICER OF CALIFORNIA COMMISSION ON JUDICIAL QUALIFICATIONS

THE NEED FOR, AND OPERATION OF, A JUDICIAL DISCIPLINARY AND REMOVAL COMMISSION [1]

The need for involuntary retirement arises when a judge who cannot perform his duties due to mental or physical disability does not or will not recognize that such is the case. When chronic illness prevents a judge from properly fulfilling his judicial responsibilities, it is vital that there be a workable procedure that will represent the public interest, notwithstanding general sympathy for the plight of a fellow human being.

What is to be done about those who demonstrate unfitness in office? (This is no reflection on individual judges anywhere.) What is the remedy for a bad judge? Judges bristle at such a question. The traditional view among judges is that anyone asking such a question must have rerecently lost a case—and is blaming the judge, or if not, is encouraging judicial disrespect. We know, however, that there are some bad judges. Common problems are disability, abuse of power, laziness, lack of professional competence, and chronic ill temper. Judges tend to be overly resistant to effective accountability. Lawyers tend to be apathetic, not wanting to rock the boat. Public tends to be uninformed and uninterested.

Removal from office and other disciplinary measures are needed when there has been misconduct, wrongdoing, or some other infraction by a judge.

There are different kinds of judicial unfitness. One is bad health. Sometimes judges are physically or mentally unable to perform their work yet will not retire or quit voluntarily. Contributing factors might be advanced age or an alcoholic condition or loss of mental faculties, or simply a chronic physical condition preventing the carrying of a normal workload. There must be an effective, independent means for investigation, medical examination, subpena power, and, when justified, compelling termination of office.

Another recurring type of unfitness is commission of misconduct or prejudicial conduct. This may involve favoritism, partiality, abuse and overreaching of the powers of the office, mixture of personal and business affairs with judicial responsibilities, partisan political activity while in judicial office, and, in the extreme form, corruption.

The third important area is poor court demeanor. Judges are sometimes bizarre, capricious, arrogant, or discourteous due to their personality and temperament. Lawyers and litigants have great difficulty in coping with judicial tyrants.

Other areas of concern are procrastination, simple inability or failure to perform essential judicial tasks, and other violations of the Code of Judicial

[1] The views expressed do not necessarily reflect those of anyone besides the author.

Conduct. Some jurisdictions have a very strict Code. How is it being enforced? Who has responsibility? I am not suggesting remotely that the majority of judges have these problems. I am saying that these are present in any large group of judges unless or until attended to.

Receiving, evaluating, investigating, and acting upon complaints by means of a commission within grounds spelled out in the law provides a fair and workable plan within the judicial branch.

Now many states have on their books modern and effective judicial disciplinary removal and involuntary retirement procedures. Most are patterned after the California Commission Plan. This permits an agency to receive complaints against judges at all levels of the state judiciary, to cause them to be confidentially investigated, problems corrected, if possible, complaints which are baseless closed, and those justifying further proceedings set for hearing. Ultimately, this can cause a judge to resign or retire or, if the judge chooses to contest the charges, the record goes to the State Supreme Court for disposition. The procedure serves as a vehicle for complaints from the public, the lawyers, and other governmental agencies anywhere. This achieves continuity—an important feature with regular meetings, procedures, and annual reports, as well as impartiality, free from political and personal pressures.

Another ingredient is expertise which judges and lawyers as members supply. The rights of accused judges are jealously guarded through carefully drawn rules of procedure.

It is important to note that the members are individually selected for appointment to the Commission: they are not on the Commission as a result of holding some other judicial or governmental office. The work of the Commission is not a minor portion of the work of an existing court. This particular selection for and acceptance of responsibility to a commission, with independent and respected status and with a four-year term, is a distinguishing feature of membership in the Commission.

It is important that the Commission have a permanent office and staff, however small. This office, readily accessible to the public, provides a means of dealing quickly with baseless charges and dealing at greater length with the more complex legitimate complaints. Data from lawyers, bar association committees, agencies of government, and of course citizens, could otherwise receive no such significant examination. The small staff, while owing allegiance only to the Commission, has the privilege of calling upon other state agencies for assistance, and the efficient utilization of the resources of other agencies by a specifically assigned Commission staff is crucial to the success of the program.

The work of the Commission is publicized, particularly to the legal and governmental community, by means of an annual report. The report does not identify specific cases, but is informative about the program in general.

The work of the Commission is of special benefit to the judiciary in that charges against judges are attended to when they are made. Criticism is often unmerited or exaggerated—it very frequently is irresponsible or misguided—and the critics, whoever they are, can be asked to specify the misconduct or wrongdoing charged and to itemize particulars. Once the effectiveness and willingness of the Commission is established, its ability to dispose of malicious accusations is enlarged. The value of this ability is appreciated when one considers the all-too-frequent missiles for which the judiciary is a natural target.

The operation of the Commission constitutes a careful program for dealing with delicate and persistent questions of ethics and conduct. A great deal can be achieved through skillful screening, evaluation, and investigation, and a judicious use of authority. And the presence of a small public institution such as the Commission, possessing sufficient but carefully defined powers, and competent to consider and deal with unfitness and transgressions, can significantly assist in raising the caliber of the judiciary, while concomitantly increasing the confidence of the public in the whole judicial structure.

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See attachments—1975 Report of the Commission on Judicial Qualifications to the Governor; Commission cases to the Supreme Court; California Constitutional Provisions; Yearly Commission Cases.

LETTER OF TRANSMITTAL

To: His Excellency, Edmund G. Brown, Jr., Governor of the State of California.

The 1975 Report of the Commission on Judicial Qualifications is presented herewith.

January 1976.

BERTRAM D. JANES,
Chairman.

1975 REPORT OF THE
COMMISSION ON JUDICIAL QUALIFICATIONS
TO THE GOVERNOR

MEMBERS

Hon. Bertram D. Janes, Chairman, Associate Justice of Appeal, Third Appellate District, Sacramento.

Hon. John B. Molinari, Presiding Justice, Court of Appeal, First Appellate District, Division One, San Francisco.

Hon. Thomas Kongsgaard, Judge of the Superior Court, Napa.

Hon. Parks Stillwell, Judge of the Superior Court, Los Angeles.

Hon. Gerald K. Davis, Judge of the Municipal Court, Bakersfield.

John T. La Follette, Esq., Attorney Member, Los Angeles.

Paul F. Kelly, Esq., Attorney Member, San Mateo.

Jerome W. Komes, Public Member, San Francisco.

Mrs. Margaret A. Shaw, Public Member, Los Angeles.

Jack E. Frankel, Executive Officer, 3041 State Building, 350 McAllister Street, San Francisco.

COMMISSION ON JUDICIAL QUALIFICATIONS
1975 ANNUAL REPORT

The Commission on Judicial Qualifications has as its principal task the receipt consideration and investigation of complaints against California judges. Each complaint is evaluated by the Commission and when the facts justify it, set for hearing, or otherwise, closed. After a hearing and review the Commission is empowered to recommend to the Supreme Court of California the censure, removal or retirement of a judge.

The Commission jurisdiction extended to 1188 judicial positions as of January 1, 1976. These were divided as follows:

Supreme Court and court of appeal	63
Superior courts	520
Municipal courts	422
Justice courts	183

I

During 1975 the Commission received 239 complaints. Of these, 191 were closed without further proceedings since they fell outside the jurisdiction of the Commission, most dealing with complainants' dissatisfaction with judicial rulings and other legal or personal problems. There were 48 inquiries or investigations by the Commission, including 43 instances in which the judge was requested by the Commission to relate his version of a matter or matters complained of, and 11 preliminary investigations pursuant to Rule 904 of the California Rules of Court. Three judges retired or resigned during the pendency of Commission proceedings.[1]

Two judges were removed from office by the Supreme Court of California following Commission recommendations for their removal. (See: *Spruance* v. *Commission on Judicial Qualifications*, 13 Cal. 3d 778, 532 P. 2d 1209, and *Cannon* v. *Commission on Judicial Qualificationsc*, 14 Cal. 3d 678, 537 P. 2d 898) These opinions clarify and emphasize the Commission's role in the administration of justice.

[1] Many judges, of course, leave judicial office because of normal retirement and other reasons wholly unrelated to the work of the Commission.

II

Many observers have commented upon certain restrictions under which the Commission operates which unduly limit the Commission's capability and effectiveness (See: Commission's 1974 Report, page 3, and *McCartney* v. *Commission on Judicial Qualifications*, 12 Cal. 3d 512, pp. 535–537 [1974]).

During 1975 a joint State Bar-Conference of California Judges Committee examined the scope of the Commission's mandate with a view to proposing improvements. The Commission was kept informed of these deliberations and cooperated with the attorneys and judges on that Committee. Co-Chairmen were Lionel Benas, Esq., of the Alameda County Bar, appointed by the State Bar, and Judge Eli Levenson of San Diego, appointed by the Conference of California Judges.

The Committee proposed a number of changes and drafted applicable constitutional language. This work product has been reported to the Board of Governors of the State Bar and to the Conference of California Judges. It is not the function of this annual report to discuss these proposals, especially since at this writing no proposed constitutional amendment has been submitted to the Legislature. The Commission does wish to point out that these suggested changes in principle would enhance the Commission's ability to deal with questions of judicial fitness and performance.

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CALIFORNIA CONSTITUTIONAL PROVISIONS

ARTICLE VI—JUDICIAL

Section 8. The Commission on Judicial Qualifications consists of 2 judges of courts of appeal, 2 judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; 2 members of the State Bar who have practiced law in this State for 10 years, appointed by its governing body; and 2 citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor and approved by the Senate, a majority of the membership concurring. All terms are 4 years.

Commission membership terminates if a member ceases to hold the position that qualified him for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

Section 18. (a) A judge is disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging him in the United States with a crime punishable as a felony under California or federal law, or (2) a recommendation to the Supreme Court by the Commission on Judicial Qualifications for his removal or retirement.

(b) On recommendation of the Commission on Judicial Qualifications or on its own motion, the Supreme Court may suspend a judge from office without salary when in the United States he pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. If his conviction is reversed suspension terminates, and he shall be paid his salary for the period of suspension. If he is suspended and his conviction becomes final the Supreme Court shall remove him from office.

(c) On recommendation of the Commission on Judicial Qualifications the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of his current term that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(d) A judge retired by the Supreme Court shall be considered to have retired voluntarily. A judge removed by the Supreme Court is ineligible for judicial office and pending further order of the court he is suspended from practicing law in this State.

(e) The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings.

COMMISSION ON JUDICIAL QUALIFICATIONS, CASES TO THE CALIFORNIA SUPREME COURT

Case	Disciplinary recommendation	Supreme Court action
Stevens v. Commission on Judicial Qualifications, 61 Cal. 2d 886 (1964) 393 P. 2d 709 (1964).	Removal	Charges dismissed.
Chargin v. Commission on Judicial Qualifications, 2 Cal. 3d 617 (1970) 471 P. 2d 29.	Censure	Censured.
Glickfeld v. Commission on Judicial Qualifications, 3 Cal. 3d 891 (1971)	do	Do.
Sanchez v. Commission on Judicial Qualifications, 9 Cal. 3d 844 (1973)	Severe censure	Severely censured.
Chavez v. Commission on Judicial Qualifications, 9 Cal. 3d 846 (1973) 512 P. 2d 803.	Censure	Censured.
Geiler v. Commission on Judicial Qualifications, 10 Cal. 3d 270 (1973) 515 P. 2d 1 110 Cal. Rptr. 201.	Removal	Removed.
McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512 (1974) 116 Cal. Rptr. 260 526 Pac. 2d 268.	do	Censured.
Spruance v. Commission on Judicial Qualifications, 13 Cal. 3d 778 (1975) 532 P. 2d 1209 (1975) 119 Cal. Rptr. 841.	do	Removed.
Cannon v. Commission on Judicial Qualifications, 14 Cal. 3d 678 (1975) 537 P. 2d 898 (1975).	do	Do.

CASES COMING BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS, JANUARY 1976

	Complaints filed	Inquiries (some kind of investigation)	Judge contacted	Resignations or retirements	Public discipline
1961	68	23	(1)	4	No censures or removals.
1962	95	23	(1)	6	Do.
1963	114	40	(1)	10	Do.
1964	67	32	18	6	Do.
1965	85	38	29	4	Do.
1966	75	33	29	9	Do.
1967	101	48	33	5	Do.
1968	132	48	35	2	Do.
1969	155	46	28	4	Do.
1970	181	33	24	2	1 censure.
1971	217	54	42	2	Do.
1972	213	64	49	2	
1973	197	40	32	2	2 censures, 1 removal.
1974	247	36	33	3	1 censure.
1975	239	48	43	3	2 removals.

[1] This breakdown not made before 1964.

Senator BURDICK. Thank you very much.

Does the State of California have a constitutional provision that would apply for impeachment also?

Mr. FRANKEL. Yes; the State has that provision and it continues to exist in the Constitution along with the existence of the Commission.

Senator BURDICK. And has there ever been an impeachment under that section of the Constitution?

Mr. FRANKEL. There was an impeachment in the post-Civil War period and there was an impeachment about 1930. There has not been any impeachment proceeding since the 1930 impeachment.

Senator BURDICK. Then the State of California saw fit to set up this apparatus by a constitutional provision, taking care of matters that are perhaps less of a serious nature than grounds for impeachment?

Mr. FRANKEL. That was part of it. The impeachment procedure was deemed to be useless. And even in the cases that were serious, the feeling was that impeachment was not used. And furthermore, there seemed to be a greater number of cases in particular of not performing duties, either because of unwillingness or because of poor

health or because of some condition. I think those were the cases that were on most people's minds, rather than the high crimes and misdemeanors or corruption activity that caused the Commission to be put into existence, but rather it was these other kinds of cases for which there was no remedy.

Senator BURDICK. Do you feel there is any danger in a procedure like this causing a judge to step down or resign when really he would not have to?

Mr. FRANKEL. You mean causing him to step down because he is being pressured or something of that nature?

Senator BURDICK. Yes.

Mr. FRANKEL. We have not had that in our experience at all and I don't think—and I have really not heard that stated. It is true that when proceedings start and an investigation starts, a judge can be put under considerable pressure, but judges are used to pressure and they live in a pressure environment. And I have seen no judge who has been at all hesitant in defending himself, in writing a letter or making an explanation of the situation or, if the matter were pressed, with obtaining counsel and resisting charges. So I do not see where this procedure goes close to the line for the reason that a judge is pressured for the reason the procedures that are in existence give him so many opportunities is to tell his story and make his defense and to defend himself. So that where the charges are unfounded, he simply goes ahead and does that.

Senator BURDICK. I am thinking of a case—well, there are such things as irate counsel and there are such things as irate litigants and there are situations—because of other reasons other than misconduct—where a lawyer lost a case. I hope this does not set up a situation where a judge says: "I might as well let the thing go, rather than get involved anymore. I might as well take my retirement." That is what I meant.

Mr. FRANKEL. Actually, those cases where you get either lawyers or others with maybe some kind of vendetta or some kind of ax to grind or some kind of a conflict, in those areas I am convinced that a commission such as this performs a kind of service to the judge that is just not available in any other way. As an example, I have heard a number of instances in which some kind of a crank lawyer or crank litigant will harass a judge and where a judge himself will quickly decide that he does not want to contend with it any more. He will say: "Look, there is this commission in San Francisco. Take your complaint there. I am not competent to deal with your complaint. If you do not like this or that, go up there." They would give my name or the name of the commission and the address and be rid of the situation, with the knowledge that they do not even have to talk to the man; they can just tell the secretary not to let him have access anymore, with the knowledge that we can deal with it. And we can deal with it in the sense that we hear the individual's story. And most, almost all charges of that kind are no doubt at the commission level, because it is a common thing for these charges to exist. And those are really quite easy to deal with.

Not until something of a rather incredible and even serious nature is shown to be supported by our own investigation will a judge have to respond to our charges. Frequently, he will be given an opportunity

to reply to a letter that we are not all that sure about whether it is very legitimate, but we will send a letter to the judge and say: "It has been stated that such and such took place. May we please hear what you have to say, because the charge is the kind of thing that we feel there should be an answer to in our file."

And I think there, too, I think judges are very pleased to be able to put something on record to counteract what someone might be saying in the press or might be carrying on privately. So my rather long answer is in that particular area I am positive that no judge has been pressured out of office due to some kind of unfair treatment or harassment by litigants or lawyers.

Senator BURDICK. I noticed in your statement that there have been two judges that have been removed by the Commission?

Mr. FRANKEL. Well, there have actually been three. The removal can only come from the Supreme Court. So three judges have been removed.

Senator BURDICK. Three?

Mr. FRANKEL. By the Supreme Court in recent years, yes. And those cases are full public record. And I might say this; that I have appended to my statement the citations for the censure cases, the removal cases that have gone to the Supreme Court. Anybody interested in this subject and the kinds of situations that arise that form grounds for ultimate censure or removal can simply read those cases, because you get in there a very practical kind of description of the conduct which justifies removal and which, if unchecked, simply goes on for a lifetime.

Senator BURDICK. Is there direct appeal from the Commission to the Supreme Court?

Mr. FRANKEL. Yes; it is more than an appeal. Every case must go to the Supreme Court. The Supreme Court must review every case including censure as well as removal. So we can only make a recommendation. This is another protection. In the last analysis, all the Commission can ever really do by way of public discipline is subject to review by the State's supreme court.

Senator BURDICK. What you really do is recommend?

Mr. FRANKEL. We really recommend. That is correct. And I might add in two instances the Supreme Court did not go along with our recommendation; one, they dismissed a case and the judge is still sitting. The Supreme Court disagreed with us and no harm was done to the judge in that instance.

In the second case, the Supreme Court agreed with most of our findings, but they decided that they did not want the judge to be removed and instead they censured him. And that judge is presently sitting.

So, in other words, this is a last measure of protection in which the Supreme Court partly in one case and fully in another case sided with the judge.

Senator BURDICK. Just by the way of curiosity, the censured judge, can he sit?

Mr. FRANKEL. He continued to sit, but he still has trouble. I can say that, because he still is—because of the nature of the opinion,

which, as I say, is a matter of public record and it aroused a great deal of local comment, but he still does continue to sit; yes.

Senator BURDICK. Your statement makes the point that the essence of any system for supervision of judicial conduct must have these essential features: one, a public office which can receive specific complaints against judges; two, a small staff to receive such complaints; three, to have a degree of confidentiality, at least until the evidence establishes serious misconduct; and four, a commission or council should have continuity in the sense of formal proceedings and annual reports. Your California commission has the attributes.

In your opinion, should the proposed Federal system for a Council on Judicial Tenure have the same attributes? I think you referred to a few other factors that could be used as grounds to be considered, but these four here are the procedural area, I believe.

Mr. FRANKEL. Yes, I think those procedural areas should also be included in any Federal procedures.

Senator BURDICK. I know California is a very large State in population. You have a small staff of two. I am just wondering how this is applied to a smaller State without that many judges?

Mr. FRANKEL. Smaller States have done this by, in effect, having part-time staff. They would work it in with some other existing office or, for example, a law school professor would do it part time. In some cases, the court administrative office would do it. So the important thing is not that the staff be fulltime, but that it be a paid staff to some extent, whether half time or full time. And of course, in the bigger States, well, for example, New York has started a system within the last couple of years and they've got a staff which is much bigger than ours.

Senator BURDICK. Have some members of the Commission, or have you had somebody available to handle the public's complaints?

Mr. FRANKEL. Yes, and not work through a judge who is the chairman of a commission; but be able to have somebody at a staff level to be able to actually work up the complaints, if that is necessary, and to assist in closing and screening complaints.

Senator BURDICK. Under the California law, the following grounds for censure or removal have been specifically enumerated: willful misconduct in office; willful and persistent failure in performing duties; habitual intemperance; conduct prejudicial to the administration of justice.

I believe that in your testimony just given, you recommend, if we should proceed along these lines, you would suggest two other grounds?

Mr. FRANKEL. Yes, I suggested that there be considered inability to perform duties of office and abuse of judicial power. I might add that some other States have included other language, such as extreme negligence, gross incompetence. And I think those also could be considered. I don't think there is any magic number of phrases. I think there is a value towards spelling out five or six bases, though. I think it does—because, for one reason, by now there is a good deal of law on the subject, not only in California but other States working out these areas of misconduct and such. So I think it provides more of a guide than just simply the absence of good behavior.

Senator BURDICK. When you referred to the phrase "inability to perform duties" do you mean from the physical point of view; the mental point of view; what point of view?

Mr. FRANKEL. Well, there is an area that borders on a health problem in which duties are not being fulfilled; they are not being carried out. And it is difficult to establish exactly what it is; exactly what causes it. And the result is that work is not being performed. Sometimes it comes with advancing age, but there is a failure to have proof as far as there being a health problem. So the Commission has found that sometimes this, in a way, falls into the cracks, because it is not a medically certified permanent disability, and there is not proof that there has been some conduct in court that would justify action on the basis of that. It has also been referred to as "gross incompetence" where the work of the judge is simply not being done and it is hard to tie it to anything else.

Senator BURDICK. Well, if the judge is sick, he would not qualify for gross incompetence; would he?

Mr. FRANKEL. Well, but if the judge comes every day to work and he denies he is sick and you cannot get a doctor to say he is sick, everybody might say: "He is sick"—but at the same time he is denying it and is simply not working. So I think the idea that if he is showing up physically and he cannot do the work and he says "No, I am not going to handle that; I cannot do that or I cannot do this" —and it is hard to work up a case of what we call "misconduct or prejudicial conduct" and you cannot always prove it, because it borders on a health problem, but you cannot always prove it—so that is what I would call a refinement. We have gone along all this time without it, but I would call it a refinement.

Senator BURDICK. In other words, a Commission determines what "inability" means in each case?

Mr. FRANKEL. Well, they do, but sometimes we have not been able to proceed with something where we thought a judge was unfit, so we say: "Well, there is inability there." Nothing is going on. The other judge is saying: "He cannot do the job." But, we have had inadequate constitutional grounds for proceeding. So we might be stuck with the case, not being able to do anything.

I might say that this is far from being any kind of a system at getting at all problems in the judiciary. It is far from that. There are a lot of areas of lack of judicial aptitude or lack of competence which we do not pretend to be able to reach, just because it is not intended to be that complete. So there are a lot of areas of poor judicial activity that we do not try to correct.

Senator BURDICK. You also mentioned: "Lack of professional competence" as being a problem. Do you have any comment on that?

Mr. FRANKEL. That, I am using in the same way as the "inability." Some States have a "lack of professional competence." And it is intended to reach the same kind of a situation where you cannot prove exactly what is wrong, except the description that I made before: "the inability." That is the same situation.

Senator BURDICK. Did you ever have a case involving that term?

Mr. FRANKEL. The case I referred to, the McCartney case, is the one that I referred to, which was a censure, in which the Commis-

sion recommended removal on. I would refer to the 1975 annual report in which we cited the McCartney case, 12 Cal. 3d, 512, pp. 534–537. There is a description by the Supreme Court of various kinds of activities by this judge that the State supreme court in California said was less than acceptable judifical behavior, but they said it is not subject to any discipline whatsoever. And that would be an area of inability or lack of professional competence. But I don't recall the specifics enough to be able to recite them now.

Senator BURDICK. In the California system, the power of censure or removal is vested in the California supreme court. The justices of that court are subject to investigation by the Commission. Should they be, and does this present a problem, in your experience?

Mr. FRANKEL. That they should be included within the jurisdiction of the commission? Yes, they should be, subject to the jurisdiction. However, in my opinion, and also in the opinion of the Commission, a better procedure would be that in the event that there is a proceeding brought against a Justice of the Supreme Court, that the whole Supreme Court be disqualified from considering the matter and, in effect, an ad hoc court be formed from appellate justices. And that is a pending proposal in California. It has almost everybody's approval that in a sense a better way of proceeding would be to take the Supreme Court out of the picture altogether, if a Supreme Court Justice is an accused. But, everyone also agrees that it is necessary that the Supreme Court be covered within the jurisdiction.

Senator BURDICK. The staff would like to ask some questions.

Mr. WESTPHAL. Thank you, Mr. Chairman.

Mr. Frankel, I am wondering if I could ask you to try to give us a concise explanation or a step-by-step explanation, very precisely and concisely, as to the steps taken once your office receives a complaint in writing about an alleged misconduct of a judge. What do you do? How is it handled? And for how long do you preserve the element of confidentiality in your investigation? Would you try to give us a brief summary of that?

Mr. FRANKEL. Yet, let me describe what happens to complaints.

Initially, we ask that complaints be in writing. And when we get phone calls and even visits, we ask the complainant to write it out. It does not necessarily have to be verified, but we want something to state that the judge is being complained against and what the individual claims to be the problem and the misconduct. That statement is examined by me, as the executive officer of the Commission at the staff level, to see if there is included in that complaint possible grounds for action or further investigation with respect to the judge. In most cases, most of the complaints are closed either at that level, without further investigation, or are brought to the Commission and closed by the Commission without further investigation. When I say "at that level" what I mean is that the staff recommends to the Commission at each meeting a number of cases which have been brought in by complaint. And these are checked on and then closed. And the work of the staff is approved as far as those cases which it decides to approve; and others, which are on the agenda and which the Commission examines more carefully, are also closed.

So the sum and substance is that either at the staff level or at the next Commission meeting, a large number of complaints are closed without any investigation really at all beyond the understanding and the filling out of the complaint.

Mr. WESTPHAL. I take it that in that category would fall complaints made against a judge that are obviously, let us say, of a crank nature. There would fall in there complaints that a judge did not decide a certain case correctly?

Mr. FRANKEL. Yes, that is correct.

Mr. WESTPHAL. And those kinds of things?

Mr. FRANKEL. All kinds of dissatisfaction, even dissatisfaction with personality or with the way rulings are made, or that the judge did not give him enough time to finish what he had to say. And I might say in here that a lot of these complaints come out of areas such as small claims, domestic relations, traffic disputes where there is a lot of personal dynamics and emotion involved, and where emotions are likely to heat up.

Mr. WESTPHAL. Now, if that kind of complaint, after this preliminary investigation, is done by the staff and then reported at the monthly meeting to the Commission, if that results in the dismissal of the complaint, does the Commission then communicate that action to the person who made the written complaint?

Mr. FRANKEL. That is communicated to the complainant in a short letter of explanation and no communication, I might add, is sent to the judge. He never hears of that kind of a complaint.

I want to go back to the use of your words "preliminary investigation" because actually it is not an investigation. It is a screening. It is only a checking in order to understand what the complaint is. But I am talking about cases in which, after understanding what the complaint is and examining the material, it is clear that it is unfounded and baseless. Maybe it is in good faith, but there is just simply nothing to warrant any further consideration. And the complainant is notified of that action, yes.

Senator BURDICK. The majority of those complainants who receive this notification that the matter has been looked into but found not to warrant any disciplinary action, do they seem satisfied with it, or are they constantly writing to you and so forth?

Mr. FRANKEL. In the majority of those cases, the majority of those people are satisfied with that explanation, at least in the sense that they do not persist further with us. Some persist and ask further question. Of course here there is a misunderstanding often of the function of the Commission, because it is not only that we are taken for an appellate body able to go into rehearing of the litigation, but often people do not understand that the power does rest with the judge, that a judge is given a lot of power intentionally and he is the one who makes the decision. So we perform kind of a function of explaining the role of the judiciary here. It is also true there are some complainants who are simply not satisfied and who write letters to other people after us. Maybe they would write to the legislature and other places, saying that they did not get their complaint adequately heard. So, I do not want to seem as if we take care of all problems like that.

Mr. WESTPHAL. Now, if the complaint, after your screening, if it is found to have some possible substance to it, what then is the procedure that you follow?

Mr. FRANKEL. The next stage is an inquiry. And this is made only after the Commission or the chairman approves it. And by 'inquiry" I mean some specific further checking into the matter, usually by writing a letter to the judge himself and asking him for his side of it or by checking with other people who were present when the incident, which was alleged to have taken place, happened.

For example, that could go to attorneys or maybe other judges to see if there really is a problem. But there is a specific kind of inquiry made and it is usually by letter.

Now, if I may go on with this? What we refer to as inquiry letters to the judge, well, some come back showing that there was a legitimate problem, but it was relatively minor. Maybe the judge lost his temper or maybe a case was undecided. Maybe there was a delay where the case should have been decided, which is a relatively minor matter.

But some come back, showing that it was either corrected, if it is correctable, or that there was some cognition on the part of the judge of the situation. So that then goes back to the Commission and in this area the complaint would be closed. The judge is notified that this letter was considered and found, whatever the situation calls for, and that the complaint is closed. And the litigant is also written to and given some additional explanation, not specifically of what happened, but in general as to how the matter was considered and then closed.

Now the letter that might come back from the judge could be of another kind. It could be that he is wholly exonerated. He makes an explanation, in other words, which the commission finds totally acceptable. So in effect, he is totally cleared. And here, too, the complainant receives another kind of a letter, explaining what has happened. Of course, ths judge is notified too that that matter has been closed.

Going on to the kinds of responses, there might be a response from the judge which is unsatisfactory in the sense that a situation has existed or might continue to exist which the commission is not satisfied with, but which it feels it cannot do anything more about. And the judge has not satisfied the complaint, for example, but we feel that it is just outside our area. Maybe it goes too much to a question of the personality of the judge. Maybe he is just short tempered. And we just cannot do anything about that. It is not bad enough to take further action. Maybe he refuses to recognize it himself. That is a smaller area of what I would call just simply uncorrectable cases, but which do not warrant further proceedings.

Mr. WESTPHAL. If the complaint involves matters which look like they involve one of the grounds for censure or removal, such as some misconduct on the part of the judge which is unacceptable, does the commission then decide to hold hearings on it? When do you reach that stage?

Mr. FRANKEL. It is not at that stage. There would be a much fuller investigation. If the commission wishes to go ahead at the

level that we are at now, there would be a fuller investigation. We would normally have to accumulate more data than we have through an investigator. Sometimes a transcript or some other method discloses enough information so that we don't need further investigation but we would, at least, write the judge again an official letter saying that this is the preliminary investigation. This would go by registered mail. It would cite the constitution and we would send him a copy of the rules and it would ask him to make an official response to these allegations. This still would be by letter.

And then that investigation would be completed in the sense that the commission would discuss it at another meeting after the judge had had an opportunity to respond in this official way. The results of the further investigation would be disclosed. At that point, the commission would decide whether there were grounds for holding a hearing and for citing the judge for charges. And if that step is taken, a notice of charges is prepared against the judge. The commission obtains a counsel. He is called an examiner. He is, in effect, the prosecutor. And the judge is served personally with the notice of charges.

At that point, it follows the nature of a prosecution of any trial, that is, with legal evidence being introduced and so forth, except that it is still private in California, at least. It is not a public trial, in other words. And it would not become public until after the hearing is over and after the commission has reviewed the findings and made a recommendation of discipline.

Then at that time the whole record becomes public and it goes to the supreme court.

Mr. WESTPHAL. In other words, what you are saying is that all of these proceedings and the various types of complaints that we have discussed, Mr. Frankel, are by statute confidential and they are not released to the public until such time as the commission files with the supreme court a petition and a recommendation? Is that what the procedure is?

Mr. FRANKEL. That is correct.

Mr. WESTPHAL. What if the complainant himself tries to make this complaint public? Is he prohibited by law from doing so, up until the time of the proceedings being filed with the supreme court? Have you ever had an experience with that?

Mr. FRANKEL. Sometimes our matters do reach the public stage at a point earlier than envisioned by the procedure we discussed, either because the complainant makes it public or sometimes the judge will make it public himself for his own purposes, or it might be simply that some newspapers have gotten on to the story or are just following it themselves. We have tried to prevent anyone, any member of the public, from doing something like this, that is, from making something of this kind public. There is a proviso in our rules which does allow the commission to issue a public statement at an earlier stage. This is rule 902(b) of the California Rules of Court. And the point here is that in a few instances, for example, if there is going to be a hearing and the matter has become public, rather than simply refusing to say that there is or is not a hearing when a lot has

already been printed about it, the commission will issue an announcement saying that it is true that there are charges pending, but they have not been proven and that the judge is entitled to a hearing.

Similarly, here a judge has been cleared and the charges have been aired—and the commission recently did this as a matter of fact—the commission issued a release saying that such and such charges were made and were given a lot of attention and the commission considered them very carefully and closed the case as being unwarranted and baseless. At that time, it mentioned the judge's name and mentioned the whole thing. This was at the request of a judge. So we do have a rule which allows public information in these very narrow cases.

Mr. WESTPHAL. Now, attached to your statement you filed with the committee there are some statistics covering the experience of your commission since 1961 and for the most recent year of 1975. Let me just mention briefly what the figures show.

The figures show that you received a total of 239 complaints in writing. Of that number, only 48 proceeded to the point where there was some kind of an investigation, some kind of an inquiry made. Out of those 48 cases, 43 instances showed the judge himself was contacted.

Mr. FRANKEL. That is right.

Mr. WESTPHAL. Five other instances showed the investigation was made but the judge himself was not contacted.

Mr. FRANKEL. That is correct.

Mr. WESTPHAL. And then from this group of 48 cases that were investigated, I take it from your statistics there were a total of five that were serious enough so that they resulted either in a petition for removal being filed with the supreme court or, either prior to that being done or after the petition was filed with the supreme court, then three judges, in fact, resigned or took retirement.

Mr. FRANKEL. That is only partially correct. Since these figures are yearly figures, the two removals were carryovers from the preceding year, and this shows that the supreme court action took place in 1975. The recommendations went to the supreme court the year before. So the——

Mr. WESTPHAL. But subject to that overlap, do these figures for the year 1975 indicate the relative percentage of the types of written complaints investigated and followed through by your commission and which resulted in serious proceedings?

Mr. FRANKEL. Yes, that is correct. And I might say that that has been typical of the past several years with the proviso that we have never had two supreme court removals in one year before. But outside of that, the figures that you gave do give a good indication of the flow of the work of the commission.

Mr. WESTPHAL. Your annual report indicates that there are 1,188 judicial positions in the Statae of California that are subject to the power of your commission. And you state the staff of the commission consist of yourself and one secretary. Do you feel that that small a staff is adequate to handle this type of proceeding, when you've got almost 1,200 judges that are subject to your jurisdiction?

Mr. FRANKEL. Yes, it is, for a couple of reasons. To begin with, the commission actually has a very narrow purview. The commission does not go inquiring into things that are none of its business and its business is very narrowly defined when you come right down to it. There simply is not that much judicial misbehavior. It is a comparatively rare thing.

Secondly, we find that most or many cases that reach us have had some kind of a workup by some other agency, so that a lot of investigation is not needed. For example, a transcript is often all you need in order to show what took place. And it is not necessary to do a lot of investigation in that instance. Perhaps there would be something already on file by a district attorney's office or a public defender's office or a grand jury or some other kind of an agency. So we often ride on work that has already been done. This could be work from the administrative office of a court itself, of a local court. Its own administrative framework might provide figures or information that would be useful. So, often it is only necessary to activate whatever should be done, rather than doing comprehensive investigation.

Mr. WESTPHAL. I have one other point, Mr. Frankel, on which I would like to have the benefit of your experience.

Several years ago the Code of Judicial Ethics was revised and that code of ethics has been adopted by a number of States and in the Federal system. A specific part of that code is the canon on disqualification, which specifies the circumstances under which a judge must disqualify himself from participating in a particular case. Now that canon in the Federal system has, in effect, been codified. Section 455, title 28, is virtually a codification with some slight changes of that ABA canon on disqualification.

Now, does the California law have an express statute requiring judges to disqualify themselves for conflict of interest of various types?

Mr. FRANKEL. Yes, it does.

Mr. WESTPHAL. If a judge does not disqualify himself and a party contends that he should have, and if that party files a written complaint with your commission, does your commission look into that type of thing?

Mr. FRANKEL. Well, we would certainly consider that. Of course, the first thing to find out was whether there was some kind of waiver or whether there was disclosure. The practice in California is frequently if there is some kind of a conflict whereby the statute calls for disqualification, if a judge discloses something—for example, it could be a financial interest that he might have—the parties might stipulate his hearing the case if he discloses it. But, that would just be an example of the kind of checking that we would do.

But, if we found that a judge, either through that method of some other way, did not justify his carrying on with the case, that would certainly be a type of thing that the commission could consider and look into.

Mr. WESTPHAL. On the other hand, if a complaint of that kind was filed, and if your investigation indicated that the litigants themselves in that case had pursued that point and had taken an appeal—and let's say this appeal had decided that the judge's failure to disqualify himself was one of the errors in the case—if that situation

occurred, if that point was ruled on by the appellate court, would your commission, under the circumstances, entertain a complaint of that kind?

Mr. FRANKEL. I think that would be a good one to consider and to try to hear what explanation there would be of apparently acting inconsistently with the statute, yes.

Mr. WESTPHAL. I think my point is that if an appellate court had looked into that same point on appeal, that if the appellate court had concluded whether the trial judge should or should not have disqualified himself, and if those were the facts in the case, would your commission pursue the matter further if a written complaint was filed?

Mr. FRANKEL. Well, in your situation, Mr. Westphal, would the appellate court be supporting the action of the judge?

Mr. WESTPHAL. Well, it could be either way. If the appellate court said that they would not reverse because the trial judge was correct and he was not required to disqualify himself, it seems to me that there would be no need for your commission to go any further.

Mr. FRANKEL. That is correct. If the appellate court had made a ruling, that would also be part of the investigation. If the appellate judge had ruled that the judge was justified in not disqualifying himself, then the commission would not give it any further consideration, notwithstanding the complaint.

Mr. WESTPHAL. All right, on the other hand, if the appellate court said, "No, the trial judge was wrong and he should have disqualified himself"; if they ordered a new trial, if that was the result, again it seems to me there would be no need for your commission to act in that specific instance, unless it was perceived that his failure to rule properly on the motion to disqualify himsel was tantamount to willful misconduct in office. Do you see what I am trying to get at?

Mr. FRANKEL. Yes, I think I do. Something like this would at least be considered, because it would be open to two possibilities: That the judge would be acting in good faith and honestly thinking there was no need for him to disqualify himself; or he could have had some motive, which would be in effect partiality or some kind of bias on one side or the other or some kind of a judicial arrogance by refusing to follow the law. So, I would say it would be a question of at least looking at the situation to see whether he was acting in good faith or not.

Mr. WESTPHAL. If we take it one step further, and suppose the basis of the complaint was that the judge held stock in a certain company and that he never disqualified himself, even though that company had an interest in the outcome of that litigation, and suppose you had five or six or seven or eight cases of that kind, along this line, where the judge just would not disqualify himself, might that set up circumstances that would bring it within the purview of your commission?

Mr. FRANKEL. Yes. The best answer I can give to that is situation such as you are describing, Mr. Westphal, would go to the commission and the members of the commission would discuss it among themselves and ask for whatever further information they felt they needed. And this would be an opportunity for the commission, as members, to exercise their own discretion to weigh the situation and to just make a judgment themselves as to whether they thought that

further investigation or proceedings should be taken. And they would do that on the basis of the whole picture, that is, of what else there was to it.

Mr. WESTPHAL. During the time that you have been with the commission—and how many years has that been?

Mr. FRANKEL. Fifteen years.

Mr. WESTPHAL. Has your commission acted upon complaints where there has been a charge that a judge refused to disqualify himself when, under State law, he should have?

Mr. FRANKEL. Have I had any cases of that sort? One area such as this has come up. It is a little bit different, but it is the Code of Civil Procedure, 170.6. That Code in California is an automatic disqualification whereby a litigant may disqualify a judge from any case merely upon filing an affidavit. And some judges do not like that procedure. There have been instances in which they have refused to follow it. They have refused to disqualify themselves, even though the statute clearly requires disqualification without any reason being stated. And sometimes there have been a few occasions where the situation has developed that the judge is, in effect, refusing to follow the law and will act discourtiously toward an attorney or a complainant who tries to raise this. And that kind of a situation we would pick up and at least go into it. And how far we would go into it would depend again in whether this was a course of conduct that was misconduct and what the rest of the situation was. But, one of the cases of public discipline did involve that situation that I described, as one of its features.

Mr. WESTPHAL. The reason that I ask this question is that I am having a little trouble in my own mind trying to determine if you don't get some kind of overlap here in this area of disqualification, because I think that the litigants in the case have certain rights which they may protect by raising the issue and by pursuing an appeal. Now that is one way to enforce statutes on disqualification. And just off hand, I would think that would be sufficient if all we are talking about is an individual case. In that circumstance, I really do not see why a liigant should get a second shot at it in that particular case by, for example, filing a written complaint with your commission.

On the other hand, it may well be that a commission of your type should have jurisdiction to look into a complaint of that kind, if it is no just one isolated complaint, but is a series of repeated complaints involging about the same type of question. Do you see the distinction I am trying to make?

Mr. FRANKEL. Yes. I think that this has to be a question of discretion by the members of the commission for his reason. There could be an aggravated and frequent situation such as you describe. A judge could be participating where he simply has no business and where there is just no legal basis. And in that instance, I think a commission has to have the power to step in whenever it gets enough information. But, in the vast majority of situations such as this, the members of a commission would choose to defer to any appellate determination on it. And it would be the better way of disposing of it.

Mr. WESTPHAL. Thank you, Mr. Frankel. I have no further questions.

Senator BURDICK. Thank you, Mr. Frankel, for your contribution this morning.

Our next witness is Hon. Griffin Bell, attorney at law, Atlanta, Ga. We welcome you to this committee. You may proceed.

STATEMENT OF HON. GRIFFIN B. BELL, ATTORNEY AT LAW, ATLANTA, GA.

Mr. BELL. Senator and Mr. Westphal, my name is Griffin B. Bell. I wish to testify with reference to S. 1110 which would create a Council on Judicial Tenure.

I have had a good deal of experience in the Federal court system and in judicial administration. I completed 14½ years of service as a U.S. circuit judge prior to resigning on March 1 of this year. I am chairman of the Division of Justicial Administration of the American Bar Association. I am a member of the American Bar Association Commission on Standards of Judicial Administration. Until resigning from the court, I was a member of the board of directors of the Federal Judicial Center.

We begin with the fact that the Judicial Conference of the United States has approved legislation of the type under consideration in principle. The Judicial Conference of the United States exists by statute, title 28 of section 331. It has no specific power as to problems of judicial disability and discipline to which the pending legislation is addressed. The Judicial Conference is, however, representative of the Federal judges and speaks for them. It is not constituted to represent the Supreme Court.

Aside from the impeachment process, the only control over Federal judges at this time is in the judicial council of each circuit. The circuit judicial councils are also established by statute; 28 USCA, section 332. The statute vests broad powers in the council but does not specifically address the problems which are addressed in the pending legislation. I might say parenthically that the Judicial Council as set up under that statute does not extend to the Supreme Court. There is no similar statute for the Supreme Court.

The Judicial Council authority may or may not be adequate to resolve some of the problems which arise in the administration of the Federal court system. For example, in section 332(b) it is provided that each "judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council." Does this language contemplate the resolution of disability and disciplinary problems?

That is as near to touching on disability and disciplinary problems as any language is in that statute.

The pending Judicial Tenure Act is conceived on the proposition that any complaint against a Federal judge, including justices of the Supreme Court, would be filed in Washington before a Council on Tenure, to be composed to 14 Federal judges. It would be empowered to dismiss the complaint or to report the complaint to the

Judicial Conference for final disposition. The Conference or a committee of the Conference would sit as a Federal court to decide the case with power to dismiss, censure, remove, suspend or involuntarily retire the judge from office. Review would be to the Supreme Court.

According to an editorial appearing in Judicature, May 10, 1975, Senator Nunn has agreed to add laymen to the Council on Tenure and I have not had an opportunity to see if this change has been made in S. 1110.

I wish to make two suggestions as to amending the pending bill in an effort to preserve the independence of the Federal judiciary. One goes to the makeup of the Council on Tenure. The other goes to an exhaustion principle before the respective Judicial Councils of the circuits being required prior to jurisdiction arising in the Council on Tenure in Washington.

Based on long experience I can use a few hypotheticals to make the point. Assuming arguendo a judge has become addicted to narcotics because of an illness, should he be allowed to continue to sit as a Federal judge? Next, assuming arguendo a judge who is an alcoholic and appears on the bench in an inebriated condition, what should be done about him? Another example would be a set of circumstances which indicate a lack of propriety on the part of a judge in a particular case suggesting possible venal conduct, and the circuit Judicial Council becomes aware of the event through the press or by a letter to he Council. Does the Council have the power to investigate? Another example is in the sensitive area such as a school desegregation case. Emotions run high and it is not difficult to imagine charges of misconduct being levelled at a judge by those bearing the brunt of the order.

We can turn these examples around and assume that each complaint would be filed in Washington with the Council on Tenure. The bill includes a staff to conduct the investigation out of Washington and without local knowledge. If its own agents are not to be used, then the Council on Tenure would need to turn to the local U.S. Attorney or the FBI for investigative help. In this event, the local judge would be investigated by the executive branch through the Justice Department, a principal litigant in the Federal courts.

In my experience of 14½ years, I can see the justification for a Council on Tenure in Washington on a standby basis and to be used as a last resort. A complaint should be filed in the first instance in the Judicial Council of a circuit and a reasonable time, probably 90 days, should be allowed for the circuit council to act on the matter. I would amend the pending bill to provide that the Council on Tenure have no jurisdiction over a complaint until 90 days after the same complaint has been filed with the Judicial Council of the respective circuit. Now, parenthetically, I also make the same provision as to the Supreme Court, with the Council on Tenure having no jurisdiction until 90 days after the complaint had been filed with the Supreme Court. This would give the Supreme Court an opportunity to handle their own complaints.

Most matters would be handled by the Judicial Council and there would be little left for the Council on Tenure to do. The Council on Tenure could act, however, in the rare case where action was needed

on a national level and thus further assure the purity of our system of justice.

As you know there are several States that have commissions or councils similar to the Council on Tenure and most have lay membership. The American Bar Association on Standards of Judicial Administration in its report on Court Organization, recommends such a council in each court system. Its recommendations are addressed principally to State systems and a modification for a national system, given the size of the Nation should include this suggestion of exhausting remedies in the circuit judicial council.

The Federal judges of America are devoted to the system beyond measure. They live under heavy caseloads and a good deal of harhassment. I hope that the Congress will not see fit to increase their burden by causing them to respond to complaints filed in Washington until the complaint has been looked into at a local level, and in the case of the Supreme Court, in the Supreme Court itself.

One additional amendment would appear in order. There are to be 14 judges on the Council of Tenure. One is to be selected from each of the 11 circuits and one each will be from the Court of Claims, Court of Customs and Patents Appeals, and the Customs Court. This means that 7 of the 14 judges will reside in the area between Washington and Boston. I do not think that this narrow base will be appreciated by the judges of the South, mid-West and West where, it happens, most of the judges in the federal system reside. I would hope that representation can be on a more representative basis even if not on a one-judge, one-vote concept.

I have not mentioned the Supreme Court, except parenthetically. The lower court judges will wonder why they have been selected for special treatment if the Supreme Court Justices are excluded. The Judicial Conference has no jurisdiction over the Supreme Court and therefore cannot speak as to including the Supreme Court. This it happens, most of the judges in the Federal system reside. I would hope that whatever the final result, all judges would be treated equally from the standpoint of the purpose of the proposed legislation.

It will be said that we should be careful not to interfere with the independence of the Supreme Court. This is true of all courts. There may be some difference in degree because of the exalted position of our Supreme Court in our constitutional system but an independent judiciary on all levels is devoutedly to be desired.

I am not troubled over the constitutionality of the proposed legislation. Impeachment is drastic and final. The power vested under the proposed Act is in the nature of suspension from duty. Even in the rare instance where suspension is permanent, the judge continues to receive his salary and other benefits and to hold his office as a judge, but someone is appointed to take his or her place. The situation is not unlike the situation now allowed by statute, 28 USCA. Sec. 382(b), where the members of the Judicial Council of a circuit may certify that a judge is disabled. This certificate is made to the President who must find that the judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or

physical disability in which event the President may appoint a successor judge.

I believe that has been in the law since 1948 and has been used several times.

In sum, legislation on the principle of S. 1110 may well enhance the Federal court system. We are living in a time when our public institutions are under examination and the courts are not exempt. A citizen should be afforded a clear method for complaining against the courts.

If amended as suggested, a citizen's complaint would be filed in the circuit where the judge resides against whom the complaint is made. Failing a solution on a circuit level, the complaint may then be filed in Washington but before a Council on Tenure, the members of which are representative of the geographical location of the Federal judges in the Nation as a whole.

That concludes my statement.

Senator BURDICK. Thank you, Judge Bell, for your contribution this morning. It was a very good statement.

Under the statutory power, the Judicial Council of the Second Circuit, as set forth in section 332 of title 28, provides in part:

> Each Judicial Council shall make all necessary orders for the effective imposition, administration, and so forth, of the business of the court within its circuit. The district judges shall promptly carry into effect all orders of the Judicial Council.

Now, in a complaint against a judge, if it involves laziness for example, or persistent failure to perform duties, this statutory language would appear to give the Judicial Council power to act. But, if the complaint is abuse of power, habitual intemperance, arrogance, chronic ill temper, I would assume that the Judicial Council's authority is only persuasive.

For example, you cannot enforce an order that a judge be more courteous, isn't that true?

Mr. BELL. That is true.

Senator BURDICK. So if you suggest that the Judicial Councils are to be kept in the scheme of things, we must either amend sections 332 or amend S. 1110 to give some specific responsibilities and powers to the Judicial Council.

Do you agree with that?

Mr. BELL. Yes; I do.

Senator BURDICK. If we keep the judicial councils in this system of supervising judges' behavior, then we have a three-stage procedure, rather than a two-stage procedure, as contemplated by S. 1110. Do you think it is advisable?

Mr. BELL. I think it is advisable, highly advisable.

Senator BURDICK. Is the Council on Tenure, composed of judges from all 11 circuits, likely to be more objective than a Judicial Council, if the accused judge in on the circuit?

Mr. BELL. Well, possibly so, in the rare case that would reach the Council on Tenure. I think if the Judicial Council of the circuit had clear power, that there would be very few cases that would ever reach the Council on Tenure. I have seen some hard cases myself, and I have never seen any reluctance on the part of the circuit council to do whatever is necessary in the circumstances.

So it really depends on the experience that the judges have had. As you know, the experience varies greatly between the circuits, depending on what the local problems are and the litigation that they have had.

Senator BURDICK. Following your suggestion, there would not be much work for the Council on Tenure?

Mr. BELL. I think the staff might be the size of the California staff we just heard about. They would have very little to do, in my judgment. I don't see that they would have many problems over the borderline. That is to say, usually you can look at the complaints that reach the circuit council, and you know pretty well what the outcome is going to be.

I can see how there might be something about discourtesy or something on that order that might be filed, but you are never going to remove a judge for being discourteous. You might censure him. I doubt there would ever be anybody removed or suspended from office for that. Well, maybe for a short time, if the man repeats it.

So, I cannot see that there would be much work for the Council on Tenure. But, as I said, I think it would be a good thing to have it on a standby basis, because there could be some case where the circuit council would not properly handle something. Under the constitutional scheme, it is intended that somebody on a higher level should look over what the judges are doing on the local level. And when judges have so much power, as Federal judges do, I don't think it would be out of the ordinary to have some regulatory scheme. I think it is important, though, to amend section 332 or S. 1110, either one or the other, to spell out the powers of the council.

Senator BURDICK. Does the staff have any questions?

Mr. WESTPHAL. I do, Mr. Chairman.

Judge Bell, you told us you served 14½ years on the Fifth Circuit Court of Appeals. And you, as did your colleague, Judge Ainsworth, when he testified before us a couple of hearings ago, each of you implied that the Fifth Circuit Judicial Council has been, not in volume, but they have been active insofar as reviewing complaints that are brought to their attention about the conduct of one of the judges, either a district or a circuit judge, in those states that comprise the fifth circuit. From your knowledge, are there other Federal judicial circuits where the Judicial Council has been reasonably active in the pursuing of complaints of that kind?

Mr. BELL. I am not aware of it.

Mr. WESTPHAL. Do they all do it?

Mr. BELL. I don't know of any. There may be or may not be. I just have no knowledge about the other circuits. I know our circuit has been rather heavily involved over the years.

Mr. WESTPHAL. I take it your experience has been—let's take the area, for example, where the complaint is that the judge is not performing the duties of his office, is not pulling his share of weight on the oars, for example—your experience is that the existent statutory power is sufficient for the Judicial Council to, in effect, order him to pull his weight on the oars?

Mr. BELL. Right.

Mr. WESTPHAL. In this type of a complaint—and suppose we had the same language as is in the California statute, that is, that

a judge willfully and persistently fails to perform the duties of his office because he is lazy—this is the type of a complaint that can probably be better investigated at the circuit level by the Judicial Council rather than by a Council on Judicial Tenure and its staff. Would you agree with that?

Mr. BELL. I would agree with that.

Mr. WESTPHAL. In the area of habitual intemperance, let's say, I think human nature is such that all of us hope that the condition of that type would be correctable by the individual that is involved. And if there is a possibility that the intemperance could be corrected and that it has not reached a stage of being habitual, again it could probably be best handled by the Judicial Council of the circuit, that is, by the man's peers, rather than by a Council on Tenure composed of 14 judges from around the country. Would you agree with that?

Mr. BELL. I would agree with that.

Mr. WESTPHAL. So that of the types of complaints about official misconduct that may be made against a judge, there are some of them that are better handled, at least in the first instance, at the so-called local level, rather than the national level. Would you agree with that?

Mr. BELL. That is my thesis.

Mr. WESTPHAL. Now, in your testimony, you indicated that the complaint should be filed with the Judicial Council in the first instance. When Judge Ainsworth was here, we had some dialog with him about the fact that there is some benefit to having a central collection point or a central filing point for complaints of this kind. And the discussion was that it would be advisable to have, for example, the Director of the Administrative Office be designated as the central filing point and to permit complaints to be filed in writing, either with the director's office or with the chief judge of the circuit. And if it is filed at the circuit level, that a duplicate filing should be made at the director's office so that there is one central point.

By the same token, if the complaint is filed in the first instance with the director, then there is some discussion that, as you suggest, that he should immediately refer it to the judicial council of the appropriate circuit. Now is that the type of procedure that you could agree with?

Mr. BELL. I don't think I could agree with that, Mr. Westphal. I do not favor any filing with the Administrative Office at all. The Administrative Office is designed to be the bookkeeper in the operation for the judges and not to have any power over the judges. And this would be a dangerous thing to put complaints in the hands of the Administrative Office. That would be the erosion of the independence of the judges, and I do not favor that.

And also, I do not favor any filings except in the sense that somebody might file a complaint with the Council on Tenure and have it referred back to the circuit council.

Mr. WESTPHAL. Would you agree with the idea that there should be a central office, rather than having records of complaints to be investigated scattered in 11 circuits; that is to say, there should be at some place a central point rather than having 11 or 12 different places where complaints of that kind may be filed?

Mr. BELL. No, I don't agree with that. I think there would be time enough to have a central filing when the complaint is filed with the Council on Tenure. But until that time, it is just a local matter. There is no point in having everything come out of Washington. You cannot run everything out of Washington. And most of these complaints would never get up to the Washington level.

For example, just think of this for a moment. We do not have any mandatory retirement in the Federal system, so we have a peculiar problem if we have a senile judge who refuses to retire. Well, there is no reason to have a big Federal case about this in Washington. If somebody says to him, "We are going to have to certify you out of office because you are not able to do your work," well, if you talk with him some about it and if somebody has filed a complaint against him, that is the sort of thing that will be worked out on the local level. That would never reach Washington.

Mr. WESTPHAL. I would agree with you that that is the way it should very likely be handled, and very likely would be handled, but my point is this. I think——

Mr. BELL. You see, let me tell you something else along that line. I said that the judges are subject to a good deal of harassment. Well, some of that has to do with filings in Washington. For example, the Judicial Conference ruled that Federal judges have to file two financial reports a year. You would think they could get by with filing one, but every 6 months they have to file a report. And it has to be filed in four different places and this is every 6 months. That is the sort of harassment that is not worthwhile. What is the use of filing a report twice a year when surely you could get by with filing it once a year? You could also file them in just one place. Right now you have to file it with the clerk of the court, and it becomes public knowledge; you have to file with the Tamm Committee; you have to file with the administrative office and somewhere else. So, I don't favor all of these things that could be avoided.

Mr. WESTPHAL. Well, I might agree with you on your point about the disclosure filing. But I think the point I am trying to get at is this, Judge. Mr. Frankel has told us the system of the type they had in California was of great benefit both to the public and to the judiciary itself. We have 215 million people in this country right now. There are 100 Members of the Senate and there are 435 Members of the House. And I am sure that each and every one of them gets constituent mail and mail from people who are not even their own constituents complaining about some judge in particular or about judges in general or about the results in some cases, and so on.

Now, it seems to me that there is a benefit to the Federal Government if we create a system whereby any of these 215 million people, who believe that they have a legitimate complaint, could make a complaint against a Federal judge. It seems to me there would be a benefit if they could be told that there is an appropriate place to file that complaint, and that it will be loked into and that they will hear about the results of it, just as they do in the California system.

Mr. BELL. Well, I am 100 percent in agreement with that.

Mr. WESTPHAL. All right. So all I am suggesting—and you may have a very good point about how the director of the Administrative Office would not be the appropriate central point—but if we are

going to have a Council on Judicial Tenure, and even though it may meet infrequently, it seems to me that it does have to have a small staff, a permanent abode more or less at the staff level. And why could not that office be a central filing point, in addition to permitting complaints to be filed at the Judicial Council level? The proviso would be that if a complaint is filed at this one central office, it would immediately be referred to the Judicial Council of the particular circuit and then with your 90-day provision, Mr. Bell, the procedure would follow, in due course. Do you see any objection to that?

Mr. BELL. No. I think that would probably be a good procedure, because necessarily some people will not know where to file. They may file with the Council on Tenure. I think that would be a good system.

Mr. WESTPHAL. All right. You make the suggestion that under the bill, with one judge from each circuit and one judge from these three independent courts, that it seems as though there was a little bit too much representation on the east coast. What would you think if these three independent courts, instead of having one representative each which gives that as much weight as an entire judicial circuit covering six to nine States, that those three courts, that the judges of those three courts would get together and select one of their members to, in effect, to be their representatives?

Mr. BELL. That would be an improvement. That would cut it down to 12. That would mean there would only be five from the Washington-Boston area.

Of course, the problem comes about from the malapportionment of the circuits. The first circuit's got just a handful of judges and they are going to get a representative, just as the fifth circuit and the ninth circuit will. But, if you did what you are talking about, this would bring it in line. This would mean that the judges are outside the Boston-Washington area, so that would be 7 out of 12 and that wouldn't be too bad.

Mr. WESTPHAL. Now then, the bill in the form that it has been introduced in this Congress speaks in terms of the censure, the removal or the involuntary retirement of a judge. It does not speak in terms of the suspension of a judge. In other words, this procedure cannot result in the suspension of a judge, as you would have suspended a ballplayer on a ball club. On the other hand——

Mr. BELL. Well, that suspension is an important remedy. If the poor man is an alcoholic and you need to suspend him while he goes and takes some treatment, that is a very real reason to have suspension.

Mr. WESTPHAL. Well, in other words, he should not be sitting on the court at that time when he needs that time for treatment, and he should be relieved of his judicial duties. And while the court on which he sits or the judicial council of the circuit probably now has the power to relieve him partially in those assignments—the *Chandler* case notwithstanding—but maybe there should be some express power to suspend during a period of temporary disability?

Mr. BELL. I think that is so, unless the word "removal" is construed to include suspension.

Mr. WESTPHAL. In other words, another area where suspension comes in handy is in the situation that existed in the *Kerner* case. Would you agree that there should be some suspension——

Mr. BELL. Suspension pending the end of his trial.

Mr. WESTPHAL. All right. But that power should not exist in that particular situation prior to the time that the report of the Judicial Conference or a committee thereof engages in an actual trial. And even then, it should be discretionary as to whether the suspension would be ordered.

Mr. BELL. Well, what would happen there if he said, "Well, I will persist in sitting and I refuse to stand aside," then the Council could act. If they did not act, then the Council on Tenure would have to act in a hurry. That gets into the power of the Council—that gets into whether you want to have them have the power to act on an interim basis. That is not dealt with in the bill that I saw.

Mr. WESTPHAL. Another area that I would like——

Mr. BELL. There could be some kind of a case where the Council or someone ought to have power to act on an interim basis, like with a temporary injunction or something in that nature. But most of the time, you are dealing with reasonable people and most of these things might work out after you put them on the table.

Mr. WESTPHAL. But that power to suspend should be a discretionary power to be exercised by the Council on Judicial Tenure or by the Judicial Council or by the Judicial Conference itself in the rare case where it was required?

Mr. BELL. Right.

Mr. WESTPHAL. And not in every case?

Mr. BELL. Right, and it ought to be exercised with sound discretion?

Mr. WESTPHAL. All right. Now, as your statement pointed out, the recommendation from the Judicial Conference of the United States —and I believe the ABA representative made the same suggestion —was that the Justices of the U.S. Supreme Court should be excluded from this procedure. And you make the point here in your statement that you think they should be included so that the circuit and district judges would feel that everybody is being treated equally. The Constitution itself says that the judges, both in the Supreme Court and in inferior courts, shall hold office during good behavior. So that if we are going to implement a good behavior clause, there is that argument for including the Supreme Court Justices.

Now, how would you propose we handle a situation where the conduct of a Supreme Court Justice is such that it may deserve censure as punishment and where, following the procedures set forth in this act, the trial was held before the Judicial Conference and they ordered the censure of this Supreme Court Justice as appropriate punishment for discipline and the Justice then decided to avail himself of his opportunity to appeal to the Supreme Court? The preceding witness, Mr. Frankel, said that in his State there was some sentiment that in the event, they thought that every justice of the California Supreme Court should be automatically disqualified from sitting on that appeal and that their places should

be filled by appointment of an ad hoc council of members from their other courts.

How do you propose that we would handle that at the Federal level, if we do include Supreme Court Justices in his plan?

Mr. BELL. That is a difficult problem. I don't favor the suggestion from California that they all stand aside and let somebody else come in. I think if you had a Justice from the Supreme Court whose case is on appeal, it would be better off to have him tried by his peer group. And we face this frequently in the Federal Court System, where a circuit judge is designated to sit as a district judge. And it is not an uncommon thing to reverse one of the brothers on the fifth circuit when he sits as a district judge and his case is appealed. He may try a case over a month in the summertime somewhere and then, when it comes up on appeal, three of the members of his own court reverse him. So this is not an impossible circumstance.

Now if you are talking about a misconduct situation, of course that is more ticklish. That is, more delicate. I have given some thought as to what to do with the Supreme Court situation, because I think they ought to be included. But it may be you will have to design a little different system for them. For example, they don't have a judicial council, so you need to put something in the act where they get the first opportunity to pass on a complaint. It may be that they ought to be allowed to bypass the Council on Tenure, although the Council on Tenure simply makes a recommendation. I am more worried about them being tried before the Judicial Conference, because that is a group that has no control over them now.

It seems to me to be somewhat upsetting to the discipline of the system, to the discipline of the court system, to have people on the Judicial Conference—none of whom is on the Supreme Court other than the Chief Justice—trying a Supreme Court Justice. So maybe the Council on Tenure ought to make its recommendations to the Supreme Court and just completely bypass the Judicial Conference, and then the Supreme Court could do whatever they thought ought to be done about that. That would give them two chances to act. It would be very unlikely that the second phase would ever come into effect.

But I do think you are going to find that a lot of people would feel unsettled by the idea that the Judicial Conference would be trying a Supreme Court Justice.

Mr. WESTPHAL. Of course, under the provisions of S. 1110, when the Judicial Conference does enter into the procedures set forth in the bill, it enters into it and is designated as a court.

Mr. BELL. Right.

Mr. WESTPHAL. And the Chief Justice is expressedly excluded from being a member of that court, simply because he then presides on the Supreme Court when they hear the appeal. So that if the concept is to use the Judicial Conference of the United States and refer to it by name, but in so doing it is designated as a court of record for this limited purpose, there would be nothing wrong with the Congress designating it as a court with jurisdiction over the conduct of a Supreme Court Justice, even though the Judicial Conference as a Conference—and of course, with the statutory powers

which it has—does not have any jurisdiction over the operation of the Supreme Court. Do you think that that is a fair analysis?

Mr. BELL. That is, and there would be nothing wrong with it from the standpoint of law, but it just does not set well with me that a group of district and circuit judges would try a Supreme Court Justice. I would let the Council on Tenure prefer charges against a Supreme Court Justice and then let that case be handled by the Supreme Court. The Supreme Court, after all, has original jurisdiction. They could try cases now. And that probably would not upset the public to think about the Supreme Court trying one of their own people.

Mr. WESTPHAL. By the same token, you have suggested to us that it would not sit well with the district and circuit court judges if we excluded the Supreme Court?

Mr. BELL. That is right; I am just saying it is not an easy problem to solve. I think they ought to be included. But the only thing I was suggesting was that maybe you are going to have to design the system a little differently in the case of a Supreme Court Justice. It may not be necessary, but I am just throwing that out. Whatever you do, I would like to see that they are kept in.

It has never set well with some of the circuit and district judges that they had to start filing reports, because of something a Supreme Court Justice did. It was not anything in the circuit or district court that caused the reports to be filed, and yet the Supreme Court is exempt from filing the reports. And the reason they are exempt is because the Judicial Conference had no authority with the Supreme Court. It is not that they are exempt; it is just that there is nobody to reach them. However, I believe they all file reports now.

Mr. WESTPHAL. As a matter of fact——

Mr. BELL. But on a voluntary basis.

Mr. WESTPHAL. As a matter of fact, 12 or 15 district court judges take the position, as a matter of principle, that the Judicial Conference has no power to order them to file these disclosure reports annually every 6 months.

Mr. BELL. You can take heart in the fact that in the beginning there was more than that. The number is shrinking.

Mr. WESTPHAL. The bill, as drafted, says that the ground for removal is "conduct by the judge which is inconsistent with meeting the good behavior required by article such and such of the Constitution." In previous hearings, there have been some general discussions and dialog with the witnesses about the fact that it would be desirable to have a more specific definition by Congress of what type of conduct constitutes bad behavior so to speak. This morning we heard the four grounds used in the California system: Willful misconduct in office; willful and persistent failure to perform the duties of the office; habitual intemperance; and conduct prejudicial to judicial administration causing the court to come in disrepute.

Now, do you agree that something more than just saying, "inconsistent with good behavior" is required?

Mr. BELL. I doubt it. I am not wedded to the modern problem of everything being vague and indefinite. The Constitution has much language in it that would be construed today as vague and indefinite.

But I think you can use general language. People bring good judgment to problems of this sort.

And I was struck by the California law in wondering which one of those four grounds would cover senile judges.

Mr. Westphal. Well, that is the involuntary retirement for physical or mental disabilitity, I would think.

Mr. Bell. Well, anyway, you first need to think about what the problems are. What causes judges to have complaints filed against them? Then you need to design some language to meet those problems. The problems are going to be senility, alcoholism, intemperance in the sense of being discourteous, and that sore of thing, and then the other one would be laziness. Then you've got another group of judges that are dilatory. Well, you can't remove them from office for that, although perhaps you would like to. Sometimes you might feel that it would be a good thing to do.

But, if you get rid of the rare senile judge, and the alcoholic judge, you are going a long ways to solving the problem. And then you have the other lesser offenses, which will be alleviated because you do have this standby authority. A judge would not want a complaint filed against him or to be investigated, so he would do better.

But, I think censure might sometimes be in order. So, I wouldn't get too specific.

Mr. Westphal. On the other hand, if broad terms are used, this is of some benefit to the judges against whom the complaints are made. And if we have abuse of the powers given to a Council on Judicial Tenure, if that Council should, for example, become politically motivated for some reason——

Mr. Bell. Yes, that is right, too.

Mr. Westphal. So that there are two sides to this question of whether there is an advance in having some legislative classification or description of the type of conduct which is deemed to be subject to possible discipline. Do you agree with that?

Mr. Bell. You see a large number of the complaints would be covered by the language of 372 dealing with being physically or mentally unable to sufficiently carry out the duties. Now that is not misbehavior so much as it is just not being able to do your job. And a citizen ought to have a right to complain about that. Somebody ought to have the right to say something about that if you do have these people around who cannot do their jobs.

Mr. Westphal. To your knowledge, has any one of the judicial councils ever exercised that power under section 332(b) to certify to the President by a majority vote, Mr. Bell, that a particular judge is physically or mentally disabled? Has that ever been exercised?

Mr. Bell. Yes; we exercised it in the fifth circuit at least once. It may have been exercised twice. I know of another instance where we discussed with a judge the proposition of exercising it, and he decided that he would take senior status.

Mr. WESTPHAL. Do you think we should leave this matter of involuntary retirement in the Judicial Council, as section 372(b) or should we include it as one of the alternative powers or options that result from the procedures set forth in S. 1110.

Mr. BELL. I would put it into S. 1110. I would have 372(b) plus S. 1110 on that.

Mr. WESTPHAL. Thank you Judge Bell. I have no further questions.

Senator BURDICK. Thank you again, Judge Bell, for your contribution this morning.

We are recessed until tomorrow morning at 10 o'clock.

[Whereupon, at 12 noon, the subcommittee recessed, to reconvene at 10 a.m., Thursday, March 11, 1976.]

JUDICIAL TENURE ACT

THURSDAY, MARCH 11, 1976

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 o'clock a.m., in room 547, Russell Senate Office Building, Senator Quentin N. Burdick, chairman, presiding.

Present: Senator Burdick (presiding).

Also present: William P. Westphal, chief counsel; Kathryn M. Coulter, chief clerk.

Senator BURDICK. The subcommittee will come to order.

This is the last of the 5 day's of hearings scheduled for the consideration of S. 1110, the Judicial Tenure Act. Our witness today is Robert W. Meserve, a distinguished lawyer from Boston, a past president of the American Bar Association and a past president of the American College of Trial Lawyers. Mr. Meserve has been very active in the field of judicial administration and he appears here today on behalf of the American Judicature Society upon which he serves as a member of the executive committee of that organization. The American Judicature Society, for over 60 years, has made a significant contribution to the efforts to promote the effective administration of justice. It has had a special interest in the area of merit selection of judges as well as in the area of discipline and removal of judges.

At the conclusion of today's hearing record we will incorporate newspaper editorials on the general subject of judicial discipline. The three editorials are from the New York Times, the Washington Star, and the Amarillo Daily News. These articles indicate the general public interest in the problem.

We now call Mr. Meserve as a witness. You may proceed, sir.

STATEMENT OF ROBERT W. MESERVE, ATTORNEY AT LAW, BOSTON, MASS., ON BEHALF OF THE AMERICAN JUDICATURE SOCIETY OF CHICAGO, ILL

Mr. MESERVE. Thank you, Senator. You have taken away from my presentation the first two paragraphs, which I am very happy to have taken away, except I would like to emphasize the fact that I speak here today not on behalf of the American Bar Association, which of course has already appeared, but on behalf of the Judicature Society. It has about 35,000 members in all 50 States, Canada,

and 58 other countries around the world. As the Senator stated, it was founded in July of 1913, to promote the effective administration of justice. It publishes a monthly magazine called "Judicature" and publishes other books. It conducts meetings and conferences and seminars; it maintains an information and consultation service with respect to all aspects of the administration of justice and its improvement; conducts general research in the area of judicial administration; and directs and participates in studies of State and local court systems.

The directors of the American Judicature Society considered fully S. 1110, the bill before you, which is Senator Nunn's bill, and after full consideration have voted to support it, with certain minor qualifications, which I will refer to in my remarks. One of the qualifications is that they do not feel that the proposed council should be given jurisdiction over Justices of the Supreme Court of the United States.

The Judicature Society officially suggested in its vote of approval that the bill should be amended to permit the naming of laymen as members of the council. But, in view of Constitutional issues which that suggestion raises, and particularly in the absence of a Constitutional amendment, I do not propose to address myself to that issue this morning, partly because I, personally, share the expressed fear that an approach which includes even as council members persons who are not judicial officers, may create an unnecessary problem of the type I have indicated.

It is not my intention to repeat either in detail or otherwise the testimony which has already been offered by representatives of the American Bar Association, the Attorney General of Virginia and other persons who have already testified before this committee in support of this bill.

The question which is being proposed today may be interpreted as "who judges the judges?" Senator Burdick, you may remember this idea was paraphrased in the days of my youth, which was shortly antecedent to yours, I suspect, into the title of a familiar song, that is, "Who Takes Care of the Caretaker's Daughter while the Caretaker is Busy Taking Care?" That song obtained some prominence in the days of my youth. The question is the same, whether it is paraphrased or not. It is a delicate question and a difficult question. And in order to completely give the public confidence in the administration of justice, it is a question which ought to be faced in judicial administration, especially in courts where, as in the courts of the United States, judges serve during good behavior.

There is, of course, available the constitutional remedy of impeachment. I will have a few words to say about that in a moment. But I share the opinions, which have already been expressed by others, as to the difficulties with the use of the impeachment process. Some years ago, it was my pleasure to be asked by the American Bar Foundation to serve as chairman of a committee which was consulted on research and which eventually approved the printing of a small book, which I am sure the committee has available to it, which was entitled "Who Judges the Judges?" It was written by William Thomas Braithwaite. During that process, which approached the

problem from the State's point of view, I studied a good deal of the then literature and the then-available information concerning procedures and State committees of the type proposed by the Nunn bill. I reched the conclusion, and I think all the committee did with me (and the author also) that the book asserts; namely, that impeachment is an unavailable substantial remedy in the States.

I would suspect that in the United States it is obviously a nonpractical way of dealing with the problem, except perhaps in the cases of great national importance, such as the proposed impeachment of a member of the Supreme Court of the United States. That is where I part a little from the language of the proposed bill. But such cases are rare, and such cases might well be, because of their constitutional importance, dealt with solely by the Senate.

Leaving that area, however, with more than 500 judges to be affected by this bill, it seems to me that the remedy by impeachment is a remedy which is really not available at all. It is so tied in with the political process, and it is so disruptive of the activities of the legislative branch, as to be seldom invoked.

And it seems to me it is clear that it is an ineffective remedy which deserves the words which were addressed about it by Mr. Jefferson shortly after the adoption of the Constitution. I cannot add to what he had to say then as a prophet. And in that regard, he seems to have been a better prophet than he was on some other things that I know about.

So, I get back to the idea that there ought to be an alternative remedy. I don't deal in my remarks with the constitutional question. It seems to me that Professor Berger, who testified before this committee, and Mr. Justice Rehnquist, before he became Mr. Justice Rehnquist, and other people who have researched this problem, have a lot more knowledge about the constitutional issue than I. And I think the argument that a court, constituted within the judicial branch, which acts on such subject matters of judicial removal, should be free of constitutional question. I disagree with Professor Kurland with all due deference, and with other people who have taken the opposite position on the matter. And after all, as was said in another connection, we will never find out who is right unless and until there is a controversy sent to the Supreme Court for its determination. The only way I can see to present such a controversy is to go forward with this legislation. And in my opinion, that question would be resolved in favor of constitutionality.

I think that the present bill constitutes an answer to the review which continued, if it did not begin, with Mr. Braithwaite's book.

Now, it seemed to me that the most useful thing that I could do this morning, apart from approaching the subject by stating the thesis of that book—and the thesis of that book is that, while the number of judges whose conduct would be subject to review by some such body as we now have in the Nunn bill, would be fortunately relatively few. I think our history shows that most people who are elected and who serve during good behavior do, in fact, behave themselves. I think that the cases where a judge is accused of acting with impropriety are apt to be very important. They are apt to receive great publicity for one thing, and they raise in the mind of

the lay person, as well as the trained professional, the issue of whether or not it is not better in the long run to deal directly with this problem. Can we indeed have a Government of laws, and not of men, when a judge is substantially free from restraint except through the cumbersome procedure of impeachment.

We, at the time of the research which produced Braithwaite's book were dealing with five different systems of judicial discipline which were applied in various States; California, New York, New Jersey, Illinois and Missouri being the ones which come to mind.

Apart from that, I thought that one of the mose useful things that I might do for the committee this morning is to report on the results of a current survey undertaken by the American Judicature Society, which I appear for. And I would like the permission of the chairman to make available to the subcommittee printed copies of that study as soon as they are off the press.

From that study, it appears that out of a possible 52 jurisdictions in the United States, the District of Columbia and the Commonwealth of Puerto Rico, there are some 46 which have either formal boards, commissions, or courts charged with the process of judicial discipline or have informal bodies which deal with the same subject.

[A table summarizing a study mentioned by Mr. Meserve appears at the end of his testimony.]

Mr. Meserve. Currently, a total of some 362 persons serve as members of those bodies, including, incidentally, 93 laymen nonlawyers. I will submit that survey in tabular form to the committee through its counsel, if I may, at a later date. Two States use only lawyers on such committees. Two jurisdictions use only judges, as Senator Nunn's bill does. And two States, including the State of Massachusetts, use both lawyers and judges. The rest have laymen membership in a greater or lesser degree. And there are only six jurisdictions out of a possible 52 which do not have any process for a judicial system although some are pretty informal.

In Massachusetts, we have only an ad hoc committee which may make a recommendation, presumably to the Supreme Court or to the Massachusetts Legislature, which is our Great and General Court, as we call it.

In New Hampshire, the New Hampshire supreme court says it has an inherent power to go into the subject and the Vermont supreme court has decided that it has the power to call into being a committee when it feels such a committee would serve a useful purpose.

But it seems to me—to sum up, if the Chair please—that this indicates that the problem has successfully been wrestled with by the laboratoreis to which Mr. Justice Brandeis referred to in the New Ice case, the laboratories of State experimentation; and that the States, with substantial unanimity, have reached the conclusion that this is a desirable way—"this" being the way proposed in S. 1110—a desirable way to approach the rare problem of the judge who needs to be removed or retired, either because of misconduct itself, in some direct form evidenced by corruption, or because of age or health problems like alcoholism, addition to drugs and the like, where he is not able to perform adequately the duties of his office.

I think that with such a body of tradition and with the States behind it, the committee could well be encouraged to believe that there is substantial unanimity in this country, amongst groups that have tackled the problem, in the idea that there ought to be a removal procedure that is simpler and more expeditious than impeachment, but still is fair in the sense of giving adequate and due process to the accused judge. And I think S. 1110, in substance, does that. In fact, I am going to make one suggestion indicating that in my opinion S. 1110 may go beyond the necessities of due process. So I reach the conclusion that—and I suggest this to the committee—that State precedent here is entirely favorable, and indicates the need for the bill.

I might say that State action in many States is premised upon express constitutional enactment, but in other States, if not a majority, there is in the express language of the State constitution only provision for impeachment and perhaps removal by address or some other system known more or less to the common law, but nevertheless, those States have gone forward to create a statutory procedure.

And in the tabulation which I propose to submit to this body, Mr. Chairman, that fact will be indicated. There will be a listing of the statutory or constitutional basis in 40 States, at least, of the action taken. And I would hope that might be helpful to the committee, although perhaps the committee has already put together some such statistical study.

I think that the constitutional impeachment procedure before another department of government is a highly formal proceedings, warranted only in cases of great importance. But with all deference and in support of the position taken by the society, I think that when accusations are made against a Justice of the Supreme Court of the United States, as distinguished from accusations against those holding lesser judicial office—even though the Constitution makes no such exception our best procedure, as a matter of judgment, should be one which is handled by a body which does not include his colleagues on the Supreme Court. I cannot imagine a case, where the impeachment of a Supreme Court Justice was called for, where Congress would not feel that it must somehow find the opportunity to conduct hearings and where they would not be fully attended and carefully considered.

And I bear in mind, too, that in our entire history as a Nation I believe there has only been one or two times that the impeachment process has been resorted to as to Justices of our Supreme Court. And I suspect that, generally, that fact is so because Justices of the Supreme Court do set an example to their fellows on the bench and do, in fact, serve with good behavior consistently, making, of course, due allowance for the diversity of opinion which is proper amongst judges.

So, I urge the committee to amend the bill in that respect. That is the only aspect I would urge the committee to amend the bill, except——

Senator BURDICK. You are aware, of course, that Mr. Berger, to whom you referred to a few moments ago, feels very strongly the opposite way?

Mr. Meserve. I am one of those people who, despite my advanced years, which I already referred to, admit the possibility of the existence of difference of opinion, and I happen, in this instance although not in the general constitutional sense, to differ from Mr. Berger. But I want to make it perfectly clear that that difference is, as I might say, in the area of legislative judgment, and not in the area of constitutional judgment. In the area of constitutional judgment, I bow to Professor Berger's authority. In the area of the action taken by this committee on a discretionary basis, I would seriously feel that the committee should consider the exemption of Justices of the Supreme Court; the awkwardness that would be presented in view of the review procedure and the number of judges who might have to disqualify themselves, or ought to disqualify themselves, if we had a proceeding involing one of their brothers. All this suggests to me the desirability of excluding the Supreme Court from the provisions of the proposed legislation. And with all due deference, I adhere to that proposition, even where Professor Berger disagrees.

Senator Burdick. What do you say about his argument that there should be no judge who is more equal than others?

Mr. Meserve. I don't think that is so, sir, in my political judgment. I have practiced law for 41 years and I have appeared before every variety of Federal judge, except, interestingly enough, the Justices of the Supreme Court. And there I have only appeared in written form, asking for or opposing certiorari. I have never argued before that Court. Perhaps that is the reason I have this high degree of respect for them. But, I suggest to the committee, seriously, that there is a difference, and that the countrywide interest involved in the case of a Justice of the Supreme Court is such that he may well be regarded as being only subject to the more formal form of procedure contemplated directly in the Constitution.

I don't suggest there is any constitutional inhibition, I repeat, but merely a matter of judgment. And I would use that judgment in favor of the exclusion of the Justices of the Supreme Court.

Finally—well, not finally, I guess, I don't like speakers who say "finally" when they are not closing their remarks. But, in addition, and also with relation to the Supreme Court, I suggest another possibility which this body might well consider. The Supreme Court is overburdened, we hear, and I believe, with appellate matters. One of the ways in which the Supreme Court has dealt most effectively with that problem is by the exercise of a discretionary jurisdiction, that is, by the invocation of the certiorari process under which the Court makes a preliminary judgment as to whether or not the matter is important enough as a question of law to warrant appeal. It reviews every case, as I understand the rule, and decides whether or not there is a legal issue presented that is of sufficient merit and importance so that the Supreme Court ought formally to deal with it. Its ability to dispose of a very substantial part of its otherwise caseload by the certiorari process is the only thing that has kept it alive in the 20th Century. If the were no such procedure, the Supreme Court would have been overburdened. I suggest that the burden of required review ought not to be placed on the Supreme Court by the Nunn bill. I think there ought to be some review of every removal case if

the removed Justice sees fit to ask for it by petition. I go that far. But I think that the Supreme Court ought not to be required to hear appeals in this, or any other, area. And I think that they ought to have the discretion to say to the appellate, as they have on occasion to my clients in matters that my clients regard as of great importance both to their lives and liberties, as well as to their property interests, that: "We decide, on consideration, that there is not a sufficiently meritorious question of law—and that is, of course, all the Supreme Court reviews anyhow—so that there ought to be a full review in this particular case."

So, I think it ought to follow the normal course of other proceedings. After all, you have established two protections for the errant judge. You have formed the Council which, in effect, is going to act as the investigator and grand jury. And no matter is going to be brought before any court until the Council has first looked into it. This Council will be composed of judges who are removed from the controversy, but are used to problems of judicial conduct in this particular area.

And it seems to me giving them beyond that a right of appeal which is not absolute, but discretionary, Mr. Chairman, would be an inadequate discharge of the duties with relation to due process. So, I urge upon the Senate, in amending or considering amendments to the bill, that they consider an amendment which would make rights of full appeal, requiring opinion, discretionary with the court as they are in all other matters.

Basically, having made all of these comments, and having pointed out to the committee the way in which, almost like wildfire, the need for this system has been recognized in substantially every State of the United States, I submit that this bill ought to pass and that it will, indeed, strengthen the confidence of the people in the judicial system and will enable the removal from the barrel of the very, very occasional rotten apple.

I might say, too, that I think the existence of this procedure and of the council itself will, in borderline cases, result properly—and I don't mean by any process of intimidation—in the willingness of the judge to re-examine his own conduct and that this may lead him to feel that, perhaps he'd better resign or perhaps the duties of the job have gone beyond him or perhaps he is not well or perhaps he has been drinking too much, or whatever. In those cases, where we may have some degree of sympathy with the judge and if the California experience means anything, and I think it does, it shows that it is true in some 90 percent of the cases—this results in the judge's willingness, either to make adjustments and to satisfy the Council that there would be no repetition of the aberrant action, or it results in the voluntary decision of the judge to remove himself, without the necessity of formal proceedings. No such compulsion to review his conduct can be brought upon a sitting judge today. And I think that that is one area where the public would be well served if there were such a body as this bill would call into being. And I think also, in the case where the judge really has done something which is so substantially improper that he ought to be removed, the public would feel that its rights are vindicated by the procedure proposed in Sen-

ate 1110. And, particularly with the suggestions I have made, I do not see how anybody could feel that this is not a fair procedure. And I think the constitutional difficulties can be cleared up. And there I clearly do say that I am relying on Professor Berger and am happy to grab his coattails, whereas I am not willing to do so on the other issue to which the Chair referred.

Thank you very much.

[The prepared statement of Robert W. Meserve in full follows:]

STATEMENT OF ROBERT W. MESERVE REPRESENTING AMERICAN JUDICATURE SOCIETY IN SUPPORT OF SENATE 1110

My name is Robert W. Meserve. I live in Waltham, Massachusetts. I am a practicing lawyer in Boston and a member of the firm of Newman, Meserve, King & Romero. I have served as President of the American Bar Association, and have testified before this Committee in that capacity, but I appear this morning as a representative of the American Judicature Society and a member of its Executive Committee.

The Society is a national and international organization with a voluntary dues-paying membership of lawyers, judges and laymen of about 35,000, in all fifty states, Canada and fifty-eight other countries of the world. It was founded in July of 1913, to promote the effective administration of justice. The Society publishes a monthly magazine—"Judicature"—and other books, mimeographs and the like; conducts meetings, conferences and seminars; maintains an information and consultation service with respect to all aspects of the administration of justice and its improvement; conducts general research in the area of judicial administration; and directs and participates in studies of state and local court systems.

The Directors of the American Judicature Society, after full consideration of S. 1110, hereafter referred to as the "Nunn Bill", have voted to support it, understanding that the proposed Council is not to be given jurisdiction over Justices of the Supreme Court of the United States.

The Judicature Society officially suggested in its vote of approval that the bill should be amended to permit the naming of laymen as members of the Council. But, in view of constitutional issues which that suggestion raises, and in the absence of a constitutional amendment, I will not address myself to that issue this morning, partly because I, personally, share the expressed fear that an approach, which includes even as Council members persons who are not judicial officers, may create unnecessary problems of the type I have indicated.

I do not intend to repeat in detail, or otherwise, the testimony which has already been offered by representatives of the American Bar Association, the Attorney General of Virginia and other persons who have already testified before this Committee in support of this bill.

Some years ago, it was my pleasure to be asked to serve the American Bar Foundation—the research arm of the American Bar Association—as chairman of an advisory committee in connection with research work which finally resulted in the publication of the book: "Who Judges the Judges?" by William Thomas Braithwaite. That book, which reviewed the then procedures available in five selected *states* with relation to the retirement and removal of justices, is, I think, a useful takeoff for this Committee's deliberations. It stated the thesis that, while the number of judges whose conduct would be subject to, or need, review by somebody having the power to, at least, recommend retirement or removal, would, fortunately, indeed be relatively few; such cases of incompetence or bad conduct as had occurred, attracted great attention, were detrimental to the operation of the legal system of the United States, and warranted the consideration of procedures other than impeachment to govern action in appropriate cases.

There was an agreement amongst the members of that advisory committee and the author that traditional procedures—including particularly impeachment, the only procedure specified in the United States Constitution—were cumbersome and unworkable, and that Mr. Jefferson's well known prediction as to the inefficiency of the impeachment process had proved to be exactly correct.

When we turn to the federal system, the prospect of interrupting the legislative work of the Senate for a period of four to six weeks, or even more, so that

it might determine whether or not a given judge, at a level below that of the Supreme Court, had become incompetent or been guilty of misconduct warranting removal, was, indeed, a serious question. And the experience of the Congress with the last impeachment case, tried some forty years ago, which has already been commented upon in these proceedings, indicates the folly of relying on that procedure to police a large judicial system.

I am advised that there are presently forty-six jurisdictions (out of a possible fifty-two) with formal boards, commissions or courts charged, in one form or another, with the process of judicial discipline in the area of the United States, including the District of Columbia and Puerto Rico. A total of some 362 persons serve as members of those bodies, including, incidentally, 93 non-lawyers. Of the jurisdictions covered by a recent survey by the American Judicature Society, the results of which I shall furnish, in tabular form, to the Committee through its counsel, if I may, at a later date, it appears that two states use only lawyers, two jurisdictions use only judges (one is Puerto Rico) and two states, including my own, use both lawyers and judges. The rest have lay membership on such groups.

Looking at it another way, there are only six jurisdictions which do not now have any formal process for judicial discipline at this time. In New England, Massachusetts has only an *ad hoc* committee to recommend discipline; the New Hampshire Court relies on its inherent power; and the Vermont Supreme Court has the power to call into being a committee when needed.

I suggest again that the need for the Council and the proposed procedure, considering the number of judges in this country, exists as to relatively few cases. But the importance of law and formal court procedure in the ordering of our American democracy, with its correlative, the importance of the role of the trial and appellate judge, indeed demonstrates the necessity of a procedure, alternative to impeachment, which will function within our Constitution, in a procedure observant of the need for due process of law, yet expeditious, and one which our citizenry will believe will be fair to both the accused judge and the public. This bill provides such a procedure.

I do not intend to go into the question of the constitutionality of 1110. I am content to subscribe to the opinion of such illustrious constitutional authorities as Professor Berger, Mr. Justice Rehnquist and the others whose opinions have already been made known to this illustrious subcommittee. The constitutional issue can only be resolved if some such body be appointed, and I strongly suspect that it will ultimately be resolved in favor of constitutionality.

The question first posed by the Latin writer, Juvenal, "Who judges the judges?" which is the title of Mr. Braithwaite's book, is one which has properly concerned many people. It is clear, and it seems to me that the Constitution indicates that fact, that judges ought not to be in a position where they can conceivably be intimidated by anyone in the performance of their duties, nor subject to the fear of removal (except in the extraordinary case warranting impeachment) by representatives of the executive or legislative branch.

The chief merit of this bill, it seems to me, is that it entrusts the question of judicial removal and discipline to representatives of the judiciary—whose position is essentially the same as that of the accused judge—and provides for a review on appeal by the Justices of the Supreme Court. Even if lawyers and non-lawyers were to be included on the Cocuncil to be created (apart from the constitutional issue which arises if laymen be included), the important thing is that the body empowered to consider disciplinary action be a group in the independence of whose action judges, including those who may be complained against, should have confidence, as well as the general public. The matter of discipline should properly be removed from the control of the legislative and executive arms of the Government, except upon the solmn occasion of impeachment. And it seems to me that it is entirely appropriate that impeachment remain the sole disciplinary remedy as to members of the Supreme Court, for many reasons inherent in its peculiar status, including, incidentally, its appellate jurisdiction (if granted) over the process contemplated by the instant bill.

The social need for some such procedure as that I now urge is recognized, in my opinion, even though that procedure may be rarely used. The offending judge frequently is not conscious of his shortcomings—as where they are due to age—or may not control them, or think them serious—as in the case of alcoholism and loss of judicial temperament. It seems to me that society must be protected against the judge who becomes incompetent and intolerant after his

appointment—as well as against one who becomes corrupt. And we must devise, I think, an effective fair way to do it, which will be resorted to promptly in those cases where such action is warranted, rather than be forced to use a procedure dreaded by all because of its delay and collateral consequencies, as well as its political possibilities, as is the case with impeachment.

The instant bill, the American Judicature Society believes, meets, in principle, those needs of the United States. I suspect that the procedure will be rarely invoked, and that its more availability will result in curbing certain arbitrary tendencies, so far as they exist, on the part of intemperate judges who might otherwise take advantage of their "good behavior" status by being as *bad* in behavior as they dare to be, as well as affording a ready curb in, perhaps, more common cases where most of us would feel a high degree of sympathy with the offending judge, a sympathy which must be overcome by the need to vindicate publicly the judicial process, if we must do so.

For all these reasons, the American Judicature Society supports the bill and urges its prompt passage. I am prepared here today not only to deliver this statement, but to answer such questions as I may, concerning the Society, its membership and its objectives, which are, briefly, to improve to the full extent possible the administration of justice. I repeat that that objective will be advanced, in my opinion, and in the opinion of the Judicature Society's Board of Directors, by the passage of this bill, subject to such changes in detail as the wisdom of the Committee may indicate.

Senator BURDICK. Thank you very much for your contribution this morning. If laymen are put on the Council, as they are in most States, would this raise a question involving separation of powers?

Mr. MESERVE. Yes; it might do so. That is why, although I vary a bit from my colleagues, I don't want to argue that question. I would feel incompetent to discuss it, because it is a constitutional issue. And I would leave that to Professor Berger. And if he feels that the interposition at the investigatory stage of nonjudicial personnel would raise a constitutional issue, well, I say let's forget it for the moment. This is always subject to review. And in several of the States, if my memory serves me correctly, although I could not tell you of the specific state, a commission or committee similary to this was set up and functioning for some years. And then, in a sort of reviewing pattern, it was determined that there was no reason why law persons should not be put on, because in every State, from the language of the constitution of that particular State, Senator, the restrictions that are placed upon legislative action might be quite different. The Constitution of the United States is one thing. The constitution of Massachusetts, for example—and Massachusetts has a great constitution, sir is quite different. I would suggest that, if there is really a problem under the doctrine of separation of powers under the Constitution of the United States, that doubt ought to be recognized. We can always remedy it and put lay persons on the Council, if, at a later date, that objection seems to be removed and it is desired to put lay persons on the Council.

I would rather get the bill, with judges alone on the body, than not get the bill at all.

Senator BURDICK. Apart from the constitutional question, are you aware of any lay person on a disciplinary board of the medical societies or the dental societies or anything like that?

Mr. MESERVE. No.

Senator BURDICK. Do they ever have the use of laymen?

Mr. MESERVE. I have long ceased to be impressed by the action of other professional bodies. We in the American Bar Association and

we in the American Judicature Society have thought it was well, on such occasion as this and on disciplinary commissions, too, Senator, in some instances, to have lay personnel. And as I have stated to you, very nearly a quarter of the membership of the various State commissions that do exist are comprised of lay people. I think that is the best answer I can give you.

As to the medical profession and the dental profession, they have their own problems and they have their own mysteries. As to a judge's misconduct, normally the ordinary layman can make a pretty good judgment as to whether or not there is something there which would warrant his removal from the bench.

Senator BURDICK. That leads into my next question.

I used the dental and medical society example. What about our State bar associations, do they have laymen sitting on the hearings when they discipline a lawyer?

Mr. MESERVE. Yes, the Association of the Bar of the City of New York has just put out a formal committee report advocating that, in New York State, laymen be added to the hearing panels. And it is a fact that in many States there are laymen on hearing panels in disciplinary matters. There has been a proposal, I think, in the District—and you would be more familiar than—I that lay persons be added to panels here.

Senator BURDICK. When I was practicing law in North Dakota, we didn't have such.

Mr. MESERVE. No, you asked me a question as to fact and I tried to answer it as to fact. On disciplinary matters, speaking now personally and not in my representative capacity, I have felt in Massachusetts—where I am the Chairman of the Disciplinary Committee—that I would prefer to deal with lawyers judging lawyers. And I think this is true, in many ways, of judges. Yet judges perform even a more public function than lawyers do. I think this is all a matter of judgment. As I have said, if there is the slightest tint of a constitutional issue, I would say—and I would say this in the language of the streets—to forget it and to go on with that committee consisting solely of judges.

Senator BURDICK. I think the staff had a few questions.

Mr. WESTPHAL. Thank you, Mr. Chairman.

Mr. Meserve, as the Chairman has indicated, we have had testimony both ways on this question of whether Supreme Court Justices should or should not be included in this disciplinary system. And as you have indicated in the previous dialog with the Chairman, you feel that that involves essentially a judgment to be made by the Congress and that is probably where the issue will have to be thrashed out. But, I would like your opinion on one of the facets of that particular problem pertaining to the Supreme Court Justices annd that is this: Many years ago, the Congress enacted what is now section 372(b) of title 28, which permits the involuntary retirement of a judge for physical or mental disability. I think under the terms of that statute, the involuntary retirement is accomplished by the Judicial Council of the particular circuit certifying to the President that the judge is, in fact, disabled, and if the President so finds, then he may appoint a successor. The judge is not removed, but he is given no duties and is placed in involuntary retirement.

Now, subsection (a) of 372 is one which permits the voluntary retirement of "any justice or judge of the United States." But in section 372(b), which pertains only to the involuntary retirement by the method I just indicated, the phrase "justice" has been left out.

Mr. MESERVE. Yes, sir.

Mr. WESTPHAL. So that in fact we have this situation—which could have well come to a head in the recent Justice Douglas situation—where there is evidence of physical or mental disability which disqualifies a man from performing the duties of the office. And if the man chooses not to recognize that fact and voluntarily retire, do you believe that the Congress could then impeach him and remove him from office? Would his physical disability be a high crime and misdemeanor within the meaning of the Constitution?

Mr. MESERVE. I would have to defer on that to the opinion of others. It seems to me that surely it is not a high crime or misdemeanor to be old and to begin to lose your marbles. I may be on the verge of that myself. I don't think that is a high crime or misdemeanor.

Nevertheless, the cases which arise are so rare—of course, may I first say that I know it would require a Constitutional amendment, but I honestly believe there ought to be a retirement age. In Massachusetts we have fixed the statutory age of senility at 70 which I think is too young, since I am only 3 years away from my 70th birthday. I think 75 might be a better age, frankly.

But, it does seem to me that this ought to be dealt with in another way. You bear in mind, of course, that we suffer, in a way, in this field from some illustrious examples which are always quoted to us when we talk about older persons retiring from the court. I well remember Mr. Justice Holmes. I well remember Mr. Justice Brandeis, in whose former firm I practiced for many years. I met them both personally, and I knew them well. I knew Learned Hand. These gentlemen lived into their eighties and nineties and performed their duties well on the bench.

I think, however, the bench would be well served by some form of termination for age. There are ways this can be done, I suppose. In Massachusetts we have tried another way. We have a retirement system and we provided that as to any judge who took office after the retirement system went into effect, that by remaining on the bench after his 70th birthday—remaining on the bench a month thereafter, when he was eligible for retirement—that he waived his pension rights. That might be constitutionally permissible as to future judges. And there are other ways of dealing with that problem. And I don't think that the problem is apt to become as acute.

I thought Justice Douglas, for example, whose case you cited, showed a recognition of the fact that where the situation becomes hopeless, the judge ought to retire. I am, of course, reminded of that famous story about "a dirtier day's work I never did," which we have all heard.

But, I would still feel that it ought to be a matter which can be dealt with by this committee as to all other judges and that maybe we ought to make that distinction, which your question suggests, as between involuntary retirement and discipline.

I guess I have said all I want to say on that. I recognize the complexity of the problem. I wish we could do something effective about it before the case arises and we surely have to test it. We have had various times when people have served on that bench—and other benches—beyond the time when they really could function effectively. I recognize the problem.

Maybe yor can distinguish between that kind of retirement and removal or, in effect, quasi-impeachment.

Mr. WESTPHAL. Fortunately, Justice Douglas saved us from arriving at an impasse and I think almost everyone knew that he would save us from such an impasse.

But, nevertheless, if the impasse had occurred—and it could have occurred very easily if one of the justices suffered an accidental injury or a stroke that left him incapacitated insofar as any choice is concerned—then you would be at a virtual impasse. And it is not conceivable to think that the Government could allow that impasse to continue.

Now without a law, such as this, which might cover a case of physical or mental disability on the part of a Justice, then the country would be put into the position where the only thing you could do would be to start impeachment proceedings. And no matter how much one might want to believe that impeachment means anything that the Congress chooses to define it by, nevertheless there would be great question as to whether impeachment is any remedy at all in the case of a physical or mental disability of a Supreme Court Justice.

Isn't that true?

Mr. MESERVE. There are other ways of dealing with that, Mr. Westphal. One of them, of course, is the creation, on a temporary basis, of an additional Justice. This has been done, but not for that reason. The example I can think of was when President Grant took care of a problem that way and President Roosevelt, who tried it and met great public disapproval. That suggests that Congress, faced with that situation, could create another judgeship to relieve the burden on the Court on a purely temporary basis.

I think, however, it is possible to draw a distinction between the two.

As you suggest, if the removal is for bad conduct as such, for instance, high crimes or misdemeanors or the equivalent, then I think it ought to be—and I am referring to cases involving Supreme Court Justices—only done in the constitutional method specifically prescribed. If it were for reasons of health and age, it is possible that a different solution could be arrived at. I shudder at the thought of the brethren on the Supreme Court being called upon to deal with the conduct of one of the Justices of that Court, even on review, as constituting misconduct within the language of the Constitution. I don't shudder at that thought at all when it comes to deciding that one of their brothers is physically over the hill and not fit to serve.

Mr. WESTPHAL. So that insofar as the question of the Supreme Court Justice, and as to whether they should or should not be included in this legislation, you recognize that there is a distinction betweeen a removal or censure as a disciplinary method, and involuntary retirement in this other sense that we have talked about?

Mr. MESERVE. Yes, I do. I had not thought it all out before, but I think you are absolutely right.

Mr. WESTPHAL. Now the bill as introduced provides that the grounds for removal or censure is "conduct inconsistent with the good behavior required by the Constitution." We have had other witnesses who have indicated that they think that is a sufficient standard. Others have indicated that they think that the Congress should go further and provide, in broad terms, possibly something similar to the four grounds specified in California: that is, to have those set up as criterion, rather than the mere words "good behavior."

What are your views on that?

Mr. MESERVE. My view is that the simpler, the better. The language of "good behavior" is susceptible of understanding and interpretation by the Supreme Court. It is the constitutional language. My own feeling is that the Tydings bill, which attempted the process of definition, raised perhaps more problems than it solved in the drafting sense. I am inclined to the proposal that bad conduct, to put it in the broadest language, is sufficiently defined by itself. I cannot believe that a judicially constituted court would construe such language for political reasons. And I feel the langauge of the Constitution ought to be sufficient.

Mr. WESTPHAL. Well, if we assume that we will always have men of good conscience enforcing these things, I think we would have no problem. It seems to me that if there is not some kind of a legislative standard in there, that it might breed mischief in the future. Now these four grounds specified in the California law, just to refresh your memory, are: willful misconduct in office; willful and consistent failure to perform his duties; habitual intemperance; and conduct prejudicial to the administration of justice bringing the judicial office into disrepute. Do you have any objection to that kind of language?

Mr. MESERVE. Well, in the first place, it may go beyond questions of misconduct and raise the issue under that second head of inability to perform the duties of the office, which is not misconduct at all but the sort of thing——

Mr. WESTPHAL. The second half is "willful and persistent failure to perform." At least Mr. Frankel yesterday said the opinion in California was that that language did not reach an inability, as distinguished from a disability.

Mr. MESERVE. I still think, with all deference, Mr. Westphal, that the constitutional language is sufficient.

Getting back to your question, Mr. Westphal, I doubt very much if, by any process of definition, you are going to obviate the possibility that a body will eventually become a corrupt body. If that is the objective, I think they can get around those defined words as easily as they can get around the words "bad conduct,"—well, in my constitution in Massachusetts, Mr. Adams included the famous words "to the end that this shall be a government of lawyers and not of men." Now, people go overboard on that proposition. I think it was Lord Brougham who said, with reference to that phrase, that that meant that it exalted the harness over the horse. Brougham ought to know, because he had a carriage named after him.

I think very strongly that there must be some confidence in those who follow us and who will administer the constitutional process. I would rather give them the language of the Constitution than make any attempt to define it for them and run the risk it would be broader than the Constitution permits or be misinterpreted in such a way that it would be narrower than the Constitution.

So, my own feeling is I would as soon leave it the way it is.

Mr. WESTPHAL. One of the facts that would bear on the committee's judgment on this same issue is the fact that at least in the past when back in the 90th Congress this same subject was discussed generally, there was some apprehension expressed by various members of the Federal judiciary at that time that the creation of a system such as this would be unfairly administered and pose some threat to their independence. They generally had some apprehensions along those lines. To the extent that the Congress is able to be somewhat specific, without being too specific, that that would help to allay those apprehensions.

Mr. MESERVE. I doubt it, really. I have a feeling that they serve now during good conduct. And it seems to me that those words have obtained a gloss over the 200 years since the adoption of our Constitution so as to be relied on. They may say there is some apprehension—and I don't know who they were—but I find it difficult to think this could be drafted adequately. I would not want to comment on the adequacy of the California standards as against the constitutional standards, either.

But I would think the only thing you are doing here really ought to be, and I think it is, not to establish new standards but to establish a new procedure which will apply existing standards. And it seems to me that the best reference is to the language of the document.

Mr. WESTPHAL. Another factor that would bear on the ultimate decision on that, it seems to me, is the fact that someone, particularly members of the public, once a system of procedure is established, they might read the phrase "good behavior" or the absence thereof, too broadly. And in prior hearings, it was established through some of the witnesses that this disciplinary procedure should not, in any event, reach a situation where the Council is called upon to judge cases involving questions of whether the judge in question has made a good decision or a bad decision.

Mr. MESERVE. I agree.

Mr. WESTPHAL. I was sure you would agree with that. I can think, in my own mind, of Federal judges who have had to be protected by U.S. Marshals because of decisions that were handed down in their court.

Mr. MESERVE. Yes.

Mr. WESTPHAL. I can think of many situations—well, not many, but some situations where I suppose, if one took a pool in a particular community, you might get a very high percentage of answers indicating that a certain individual was "a bad judge." And I think there is a difference between "a bad judge" and a judge guilty of "bad behavior."

Mr. MESERVE. That is right.

Mr. WESTPHAL. This is a point that the Congress will want to consider when it determines what language it will employ here when

specifying grounds for removal. Would you agree with that observation?

Mr. MESERVE. I don't think definitional language would be helpful. I think—and again, I repeat—that I like the constitutional provisions because of their generality. And it seems to me that you've got to rely on the good judgment on the part of the panel. And of course the panel has the right, under section 378(a) of the bill, after preliminary inquiry by the chairman, to dismiss the complaint if it is found to be frivolous, and unwarranted, or insufficient in law or in fact.

I just would simply not admit of the probability that any panel constituted from sitting judges, as this panel is to be constituted, is going to make decisions which amount to the beginning of the removal process against a judge because they disagree with him on a matter of interpretation of either the Constitution of the United States or the statutes of the United States. I would rather leave a broad residue of discretion in article III judges and other judges covered by this, if any, than to attempt to define the limits of their discretion beyond the exercise of that proper judicial discretion, which is imposed upon them by the position of their office.

Mr. WESTPHAL. One other point involved in this legislation that I would like to get your opinion on is this: Nowhere in this bill is there a provision for the suspension from official duties of a judge during the period of time the charges against him are being considered. And you will recall that in the California system there is specific provision made for such suspension.

Now, in considering that point, two situations arise in my mind: No. 1, a situation which we had in the *Kerner* case where the sitting judge was indicted for a criminal offense. And it seems to me, in that situation, there should be some express power for some authority to order the suspension of a judge pending the determination of charges of that kind.

Would you agree with that?

Mr. MESERVE. Well, I thought it was in there. Maybe I am wrong. I don't think it ought to exist at the show cause level, but under chapter 379, which relates to the Judicial Conference, under subsection (e), it states: "The Conference or Committee may order any judge of the United States who is the subject of such inquiry, to cease the exercise of any judicial powers or prerogatives pending disposition of the inquiry." And it seems to me that is an adequate protection. It seems to me it ought not to arise at the show cause stage, but it should be a power of the new court, or the Supreme Court in the case of any review by it. And I guess the Judicial Conference is specifically given power also, upon report of its findings, to tell him not to serve.

I remember that there is an interim provision that——

Mr. WESTPHAL. That would cover the situation where the Council on Judicial Tenure had recommended the removal of a judge for some serious offense and the matter had been commenced as a proceeding before this court or the Judicial Conference.

Mr. MESERVE. Yes, and I think that is the stage it should be done. I cannot imagine an interlocutory group doing it.

Mr. WESTPHAL. Is there a need to have some power of suspension to cover the period of time before the matter is referred to the Judicial Conference?

For example, suppose a grand jury does return an indictment charging a sitting judge with a felony of some kind. It may be some extended period of time before the Council on Judicial Tenure would step into that picture. And if they did step in, some further period of time could elapse before the Judicial Conference acted. And I would read the language in subsection (c) on page 8 of the bill as indicating that the power to suspend came into being: "During the pendency of any proceeding under this section."

So that perhaps there must be some power to suspend expressly provided for in the statutes.

Mr. MESERVE. I think that subject is one that I would approach with great fear. I think the Council, in an appropriate case, would move rapidly if the situation, which you indicated, existed; that is, a judge who was under indictment and who refused to cease sitting in matters that related to the subject matter of his indictment. I would think they would make a very prompt report and the court could act. I hate to have the grand jury prosecutory exercising that power.

Mr. WESTPHAL. On the other hand, there is the possibility that given that indictment, that the Council might be of the opinion that they should not interject themselves into the picture at that time and that they should allow that judge to have the full opportunity to defend himself in that particular proceeding. So that it might be a matter of 2 to 3 years before the Council would act to refer something to the Judicial Conference. And I am not aware of any other provision in our statutes now which expressly authorize such suspension. My recollection of the Kerner situation was that there was some sort of an uncertain period there before Judge Kerner did, in fact, cease during the pendency of that.

Mr. MESERVE. That is correct. Well, I hesitate to see how it could be done, except by judicial action. And I don't think the Council's action is a judicial action in the contemplation of this bill. It may be a separate subject.

But let me just say that we have a comparable situation existing with respect to lawyers in disciplinary proceedings. And I again remind you that I sit as chairman of a committee on that subject matter.

And there, we find no difficulty. If the lawyer has committed some act which we are not prepared to pass upon yet, we still may go to the court and ask for a suspension. I think that that intermediate step might be taken by the Council.

I am just worried at the prospect of noncourt interlocutory action. I think that a judge probably could be persuaded by his colleagues, even a judge who has done a lot of things that are not proper, not to act. I just think that it is not within the scope of this bill. It may be a subject matter the committee ought to consider for further action, but I would hope that this matter would not be impeded by the interposition of that kind of interlocutory matter. Once it is before the court and the court decides—and of course, in Massachusetts in the discipline cases, even before we have had a hearing, if the man is indicted, we can go to the court and get a court order on that.

Mr. WESTPHAL. You are talking about a lawyer being indicted?

Mr. MESERVE. A lawyer.

Mr. YESTPHAL. Of course in Massachusetts, and I think it would be the same as it is in the State of Minnesota, the statutes expressly state that the Supreme Court has the power to suspend or disbar attorneys.

Mr. MESERVE. Right. In Massachusetts it's case law.

Mr. WESTPHAL. And the point I am raising is that I am not aware of any place in our statutes where anybody—the Supreme Court, the Judicial Council, the circuit court—where anybody is given the power to suspend a Federal judge from performing his duties. And I think that this was one of the points that greatly troubled the Supreme Court in the *Chandler* case.

Mr. MESERVE. Yes, I was going to add that.

Mr. WESTPHAL. So I think that if there is this possibility of a protracted time between the indictment for a criminal felony of the judge and attaching of jurisdiction in the court of the Judicial Conference, that this is a matter that the Congress should consider and see if we cannot arrive at a satisfactory solution.

Mr. MESERVE. I would answer the question two ways. I must say I have not directed much attention to this, but obviously from your questioning, Mr. Westphal, you have. The fact is that this problem arises quite frequently in a disciplinary context where a lawyer is indicted. The Bar has not hesitated to take appropriate steps to obtain action by a court, under provisions similar to those under that section of the bill to which we have been referring. It may be the Council would suggest to the court and the court of its own motion would decide that it did not want to proceed with the question of removal until the criminal case was disposed of. That would be the exercise perhaps of sound judicial discretion.

But I seen no reason why, the situation being called to the Council's attention and the judge refusing to temporarily withdraw from the performance of his official duties, why the Council would not bring the matter to the court and let the court make the appropriate order and then hold the case for a trial on the merits.

Mr. WESTPHAL. In other words, if you look at page 8 of the bill, at line 10, if you do that——

Mr. MESERVE. Yes?

Mr. WESTPHAL. In order to accomplish what you have just suggested, subsection (c), beginning at line 10, would be amended in this fashion so as to read: "During the pendency of any proceeding under this section or upon the return of an indictment against a sitting judge for a felony offense, the Conference may——

Mr. MESERVE. Yes, I understand, but isn't it "then pending"? The words "indictment and so forth" are unfortunate. I understand that is your suggestion at the moment, but when a report is returned by the Council to the Conference, the matter is then pending.

Mr. WESTPHAL. I understand. What I am suggesting is that a grand jury out in Minnesota may indict a Federal judge for some offense. The Council on Judicial Tenure may never receive a written complaint recording that fact before them. If they did receive such a written complaint, they might have a preliminary view that while

they should not step in, since this is a matter for the State of Minnesota to handle and the judge to take up there, so they may decide we will not step in here at this time; we will give him his day in court and an opportunity to defend himself out there, because he assures us that the charges are not well founded and that it is a political vendetta of some kind.

So that you could have such a situation or a more serious situation where there would be an outstanding indictment against a judge, a Federal judge, and that could exist for some period of time before the Council would ever act or before the Judicial Conference would ever get jurisdiction over it.

Mr. MESERVE. Well, my answer to that is a little involved. I think I would say that the Conference and, in fact, a convening of a committee of the Conference to hear the matter is not a self-starting procedure. You have relied here, and I think properly, I mean the author of the bill has relied, upon the Council to take the first step. I have sufficient confidence in the ability of the Council to move fast in an appropriate case, especially where no committee has been constituted and especially where it would violate otherwise the wise provision that the court is not a self-starter, so that I would not want to put that language in, if I may say so, here.

I would rely on the Council to move rapidly in such a case. And I might even give them authority to file a proceeding and to retain some jurisdiction while they ask for interlocutory relief on the scene.

But I would tinker with the Council's powers, rather than the power of the court.

Mr. WESTPHAL. There should be some attention given to these fanciful examples that I have——

Mr. MESERVE. Well, I don't think there are fanciful. I didn't mean to suggest that.

But, I do think that the system may work in the same way that other systems work. I think that the Council can be relied upon to take appropriate action where an interlocutory relief proceeding is necessary, and I think that upon their doing so, there is a proceeding pending before the Conference. It ought to be the body to make that discretionary determination. And I think it would consider all the aspects you have referred to.

Mr. WESTPHAL. Thank you, Mr. Meserve. You have been of great help to us on these problems. That is all the questions I have, Mr. Chairman.

Senator BURDICK. The committee is now in recess, subject to the call of the Chair.

[Whereupon, at 11:30 a.m., the subcommittee recessed, subject to the call of the Chair.]

[Subsequently the following material was received:]

Summary of Judicial Discipline and Removal Provisions in the Several States Referred to in Testimony of Witnesses Miller and Meserve

TABLE NO. 1.— JUDICIAL DISCIPLINE: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

State	Name of board, commission or court	Date of establishment		Constitutional revisions		Other methods of removing judges
		Constitution	Legislation	Date	Topics	
Alabama	(1) Judicial Inquiry Commission	Dec. 27, 1973	None	None	None	None.
	(2) Court of the Judiciary	do	do	do	do	Do.
Alaska	Commission on Judicial Qualifications	Aug. 27, 1968	Sept. 13, 1971	do	do	Do.
Arizona	do	Nov. 3, 1970	None	do	do	Recall, impeachment.
California	do	Nov. 8, 1960	May 27, 1961	1966	Censure and conduct prejudicial.[2]	Impeachment, recall, election.
Colorado	do	Jan. 17, 1967	None	None	None	Election, impeachment.
Delaware	Delaware Court on the Judiciary	Apr. 24, 1969	do	do	do	Impeachment.
District of Columbia	Commission on Judicial Disabilities and Tenure.	N.R.	July 29, 1970	do	do	Impeachment by Congress.
Florida	Judicial Qualifications Commission	1966	None	Twice	N.R.	Impeachment, Suspension by Governor.
Georgia	Georgia Judicial Qualification Commission	Mar. 30, 1972	do	None	None	None.[4]
Hawaii	Commission on Judicial Qualification	None	July 14, 1969	do	do	Do.
Idaho	Judicial Council	Nov. 5, 1968	Apr. 8, 1967	do	do	Magistrates (lower courts) hearing-judges en banc.
Illinois	(1) Judicial Inquiry Board	July 1, 1971	None	do	do	Impeachment.
	(2) Illinois Courts Commission	do	do	do	do	N.R.
Indiana	Commission on Judicial Qualification	Jan. 1, 1972	Jan. 1, 1972	do	do	Impeachment.
Iowa	do	Nov. 7, 1972	Jan. 1, 1974	do	do	Do.
Kansas	do	Jan. 1, 1974	None	do	do	Impeachment, nominating commission on showing of disability.
Louisiana	Judiciary Commission of Louisiana	Nov. 5, 1968	Nov. 5, 1968	1974	Membership enlarged; censure/suspension added.	Impeachment, taxpayers' suit.
Maryland	Commission on Judicial Disabilities	Nov. 8, 1966	July 1, 1965	1969, 1970, 1974	Each amendment strengthened the commission.	Conviction of incompetency; willful neglect of duty; misbehavior, removal by Governor.
Michigan	Judicial Tenure Commission	Aug. 6, 1968	None	None	None	Impeachment, removal.[3]
Minnesota	State Board on Judicial Standards	None	July 1, 1971	1973, 1974	Expand classes of judges; alter membership composition.	Compulsory retirement; removal
Missouri	Commission on Retirement, Removal, and Discipline of Judges.	Jan. 1, 1972	Jan. 1, 1972[6]	None	None	Impeachment.

Montana	Judicial Standards Commission	June 6, 1972	July 1, 1973	None	None	N.R.
Nebraska	Nebraska Commission on Judicial Qualifications.	1966	May 17, 1967	do	do	Impeachment.
New Jersey	Advisory Commission on Judicial Conduct	None	July 23, 1974 [7]	do	do	Removal initiated by either house of representatives or Governor.
New Mexico	Judicial Standards Commission	Nov. 7, 1967	March 1968	do	do	Impeachment.
New York	Temporary State Commission on Judicial Conduct.	Sept. 1, 1976 (effective).	June 6, 1974 (temporary commission).	N.R.	N.R.	By legislature.
North Carolina	Judicial Standards Commission	Jan. 1, 1973	Jan. 1, 1973	None	None	Impeachment.
North Dakota	Commission on Judicial Qualifications	Nov. 5, 1974	Mar. 27, 1975	do	do	Do.
Ohio	Board of Commissioners on Grievances and Discipline.	Not established by the constitution.		N.R.	N.R.	By government of bar.
Oklahoma	Court on the Judiciary, Trial Division	May 3, 1966	N.R.	None	None	Impeachment by senate.
Oregon	Judicial Fitness Commission	None	1967	Simultaneously	Minor changes re removal	Supreme court has sole removal power.
Pennsylvania	Judicial Inquiry and Review Board	Apr. 23, 1968	None	None	None	Impeachment.
Rhode Island	Commission on Judicial Tenure and Discipline.	None	May 8, 1974	do	do	Do.
South Dakota	Commission on Judicial Qualifications	Nov. 7, 1972	July 1, 1973	do	do	N.R.
Tennessee	Judicial Standards Commission	None	Apr. 27, 1971	do	do	Only legislature has power to remove; Commission can only recommend.
Texas	Judicial Qualifications Commission	Nov. 19, 1965	June 14, 1967, amended June 8, 1971 and Sept. 1, 1975.	November 1970	Put all courts under Commission; granted power of censure.	Impeachment by legislature, address to Governor, petition to supreme court.
Utah	Commission on Judicial Qualifications	Nov. 5, 1968	May 13, 1969	None	None	Impeachment.
Vermont	Vermont Supreme Court	None	None	Apr. 9, 1974	N.R.	Impeachment, suspension.
Virginia	Judicial Inquiry and Review Commission	July 1, 1971	Mar. 16, 1971	None	None	None.
Wisconsin	Judicial Commission	Jan. 1, 1972	N.R.	N.R.	N.R.	Impeachment, recall.
Wyoming	Judicial Supervisory Commission	Mar. 31, 1973	Mar. 31, 1973	None	None	None.

[1] (Alabama) appeal may be taken to Alabama Supreme Court.
[2] (California) 6-yr statute of limitations.
[3] (Florida) suspension is applicable to county judges only; must be confirmed by Senate.
[4] (Georgia) no decision: impeachment by the general assembly is probably still available.
[5] (Michigan) for reasenable cause not sufficient for impeachment.
[6] (Missouri) supreme court rule procedure.
[7] (New Jersey) supreme court rule.

[From the New York Times, Wednesday, March 12, 1975]

JUDICIAL DISCIPLINE

For the first time in its history, the Judicial Conference of the United States has endorsed a proposal for enforcing self-discipline within the Federal judiciary.

The problem facing the conference—which acts as the executive committee for all of the Federal judges—was that under the Constitution impeachment is the only method provided for disciplining a Federal judge or inquiring into his fitness for office. Impeachment is an exceedingly blunt instrument. Impeaching a judge for senility might be both cruel and silly, but under the present system, the only way to remove someone suffering from that particular incapacity or from alcoholism or other form of emotional illness. Moreover, impeachment, even if used, is not a credible impediment to habitually high-handed, arrogant or intemperate judicial behavior, and the fact is that Congress has not used the impeachment process against a Federal judge in almost forty years.

Last week, the Judicial Conference reacted to a bill sponsored by Senator Nunn of Georgia, providing for establishment of a council on judicial tenure, which could remove Federal judges from the bench for misconduct or other good reasons. The conference, recognizing that removal from office with all its attendant deprivations can now only be accomplished by impeachment, recommended a modification which would provide for mandatory involuntary retirement of judges found to be suffering incapacitating physical and mental disabilities or who had been guilty of "serious misconduct."

Sufficient procedural safeguards are written into the proposal to ensure the continued independence of the judiciary. An accused judge could be entitled to a hearing with a right to counsel and to appeal an adverse ruling, first to the Judicial Conference as a whole and then to the Supreme Court. If the charges were sustained, the judge's judicial responsibilities would be terminated, but he would retain all retirement rights. In cases not warranting removal, a judge could be censured.

The Judicial Conference has given a healthy push to an idea first proposed almost four decades ago by Senator Hayden of Arizona. During that span, Congress has made it clear that it will not discipline the Federal judiciary except in extreme cases. The Federal judges have finally indicated a willingness to place the disciplinary burden where it belongs, on their own shoulders. Congress should accept the judgment.

[From The Washington Star, Tuesday, March 25, 1975]

(By James J. Kilpatrick)

SEEKING A REMEDY FOR MISCONDUCT BY JUDGES

How may the people rid themselves of a bad federal judge? The question is almost as old as the Constitution itself. It defies a wholly satisfactory answer, but a reasonably satisfactory answer is beginning to emerge.

The suggested solution comes from one of the ablest and most thoughtful first-termers in the Senate, Sam Nunn of Georgia. Building upon some groundwork laid by Congressman Hatton W. Sumners in 1937, Nunn has proposed the creation of a council on tenure, to be composed of 14 federal judges, with authority to investigate and to act upon complaints against members of the federal judiciary.

Two weeks ago, the Judicial Conference of the United States approved Nunn's plan "in principle," though with a couple of important reservations. Under Nunn's bill, the proposed council could flatly remove a judge from office. The Judicial Conference, feeling that impeachment is the sole avenue for actual removal, would permit the council only to relieve a federal judge from the performance of his duties.

No one familiar with the federal courts would deny that a serious problem exists. From the days of the choleric Justice Samuel Chase, the federal bench occasionally has been disgraced by judges who were tyrannical, crooked, lazy or drunk. The Constitution says that federal judges "shall hold their offices during good behavior," which plainly implies they shall cease to hold their

offices when their behavior is bad. But in the absence of any constitutional provision for determining the "ungood" behavior of judges, it has been necessary to fall back on the impeachment power.

Thomas Jefferson long ago perceived the futility of the impeachment process. So far as federal judges are concerned, he wrote, "impeachment is a bugbear which they fear not at all." He felt it "indispensable" that judges be submitted to "some practical and impartial control," but he ventured no specific suggestions.

History has abundantly confirmed Jefferson's cynical view of impeachment. In the last 187 years, only nine judges have been impeached and only four have been convicted. Yet files of the House Judiciary Committee bulge with bitter complaints against judges whose behavior manifestly is anything but "good."

The sticking point for many observers lies in the word "removal." Authorities disagree. Such scholars as Philip Kurland and Martha Zizkind contend that federal judges may actually be removed only by impeachment. Such scholars as Burke Shartel and Raoul Berger take a contrary view.

The approach of the Judicial Conference avoids this pitfall. The proposed council on judicial tenure would have no power of "removal," but it could accomplish the same end by ordering mandatory or involuntary retirement of a judge for "physical or mental disability (including habitual intemperance)" or for "serious misconduct." As a practical matter, the bad judge would be debenched. He could draw his pay, but he would have no power.

Even this approach may prove ineffective, for judges form a tight brotherhood. It seems unlikely that a council of judges often would censure or suspend a fellow judge. If the preliminary investigatory authority were vested in a permanent subcommittee of House Judiciary, it might be better—but objections could be raised to this device also. The important thing is to find a workable answer. Sam Nunn is searching—and more power to him!

[From the Amarillo Daily News, Saturday, March 29, 1975]

It is beyond reason that there is not yet a way to relieve a judge from duty when he is past the mental capacity and physical ability to perform his functions.

There are now and have been in the past, many judges who literally "died at the bench" long after they were able to administer justice. Supreme Court Justice William O. Douglas is the most poignant example of this tragedy at the moment.

Justice Douglas is an invalid. It is questionable if he still posseses all his mental faculties. Yet, he is back in court now after a long illness. The only constitutional stipulation is that "judges shall hold their offices during good behavior."

A way (and impeachment is not the answer) must be found to retire a judge for physical or mental disability. Our nation is badly served, otherwise.